happened with asbestos litigation, courts facing the problem of clearing large numbers of tobacco cases off their dockets would need to find ways to expedite them. Firm trial deadlines, case consolidations, and class actions would likely be favored; scorched earth defense tactics would no longer be permitted. Defendants would no longer be able to focus all their attention and legal resources on defeating a few plaintiffs. Some cases thus might break through the industry's defenses, and these victories would provide both practical examples and moral support for plaintiffs' attorneys. At some point, the defendants might realize that their nonsettlement policy had ceased to discourage plaintiffs and would begin settling. At that point, the third wave of tobacco litigation—virtually a tidal wave—would have begun (Daynard 1994a).

Given a pre-1994 legal environment characterized by a low volume of tobacco litigation, few lawyers could afford to ignore the highly unfavorable cost/benefit ratio that would likely meet any effort to bring a lawsuit against the tobacco industry. No single lawyer, however motivated, could hope to change this situation through his or her own efforts. The transition from the low-volume to the high-volume scenario would require public events that signaled clearly to lawyers that the environment was changing (Daynard 1994a).

Paradoxically, although the *Cipollone* case was widely viewed as emblematic of why plaintiffs' attorneys were well advised to avoid tobacco litigation, it was also a crucial forerunner for the events that would soon change the litigation environment. Specifically, the Supreme Court's 1992 decision in the case—though of no avail to the resource-depleted plaintiffs' attorneys—presented other plaintiffs' attorneys with a range of potentially devastating legal theories. The trial itself had provided documentary evidence—which, as it turned out, represented the tip of the iceberg—that could be used to help establish the elements of a plaintiff's claims against the cigarette manufacturers (Daynard and Morin 1988; Daynard 1993a,b).

Among the legal theories advanced in the first two waves that remained viable after *Cipollone* were (1) a theory that cigarettes were defective and unnecessarily dangerous, because evidence discovered by plaintiffs' attorneys and antismoking activists strongly suggested that the tobacco industry had known for many years how to make cigarettes that were less likely to cause cancer; (2) a theory that cigarettes were defective, because they contained tobacco adulterated with many nontobacco carcinogenic substances; (3) a theory that cigarettes were defective, because of the dangers inherent to tobacco; (4) a theory of civil conspiracy based on evidence that cigarette manufacturers had joined together beginning in the 1950s to plan and carry out a strategy for marketing cigarettes while concealing the harmful and addictive nature of this product in the face of the developing scientific evidence of their dangers; and (5) a "Good Samaritan" theory, whereby plaintiffs could argue that the tobacco companies, having pledged in 1954 to objectively investigate the possible dangers of smoking, were obliged to carry out their promise and take reasonable action on what they found (Daynard 1988).

Potential support for some or all of these approaches had surfaced during the tortuous process of the *Cipollone* case. Documents uncovered in the case provided evidence that the tobacco industry had fraudulently misrepresented the safety of their product and deliberately concealed knowledge about the harmful and addictive nature of cigarettes. The evidence suggested that the tobacco industry had conspired to defraud the American public by pretending that it was conducting good-faith efforts to uncover the links between smoking and health and by falsely assuring the public that the results were negative or inconclusive (Daynard and Morin 1988). Some analysts predicted that future fraud and conspiracy claims would be strengthened when the court documents from *Haines* were released to plaintiffs' attorneys or when other documentary evidence of tobacco industry misdeeds was uncovered (Daynard 1993a,b). In the additional trove of documents reviewed by Judge H. Lee Sarokin in *Haines*—many of them relating to the Council for Tobacco Research's "special projects" division—was information that might support a finding that "the industry research which might indict smoking as a cause of illness was diverted to secret research projects and that the publicized efforts were primarily directed at finding causes other than smoking for the illnesses being attributed to it" (*Haines v. Liggett Group, Inc.*, Civil No. 84-678 [HLS] [D.N.J. 1992], *cited in* 7.1 TPLR 2.1 [1992]). Calling the tobacco industry "the king of concealment and disinformation" (*Haines v. Liggett Group Inc.*, 975 F.2d 81, 88 [3d Cir. 1992])—a remark that led an appellate court to disqualify Judge Sarokin from further consideration of the case on the grounds that he failed to appear impartial (p. 98)—Judge Sarokin concluded that the documents he had reviewed were not protected by the attorney-client privilege, as the industry had claimed, because the industry's attorneys had been participating in an ongoing fraud, and the documents were therefore discoverable under the well-recognized crime/fraud exception (*Haines, cited in* 7.1 TPLR 2.1). The same court that disqualified Judge Sarokin from

further consideration of the case also agreed that the evidence cited by him would support his conclusion that the crime/fraud exception would apply (*Haines*, 975 F.2d 81).

The Third Wave of Tobacco Litigation

The third wave of tobacco litigation was sparked by two key events. On February 25, 1994, FDA Commissioner David Kessler, relying primarily on a document discovered in the *Cipollone* case, sent a letter to the CSH reporting that the FDA had received "mounting evidence" that "the nicotine ingredient in cigarettes is a powerfully addictive agent" and that "cigarette vendors control the levels of nicotine that satisfy this addiction" (Kessler 1994a). The letter made front-page news. The second event occurred three days later, when an ABC television *Day One* report alleged that tobacco companies manipulated the nicotine levels in cigarettes (Daynard 1994b).

A series of journalistic and congressional investigations ensued in the spring of 1994, and internal Brown & Williamson Tobacco Corporation documents were leaked to the press. These documents indicated that the company had studied nicotine for years, that its internal stance on several issues related to smoking and health differed from what it was telling the public, that it possessed findings regarding the addictiveness of nicotine and the health dangers of smoking and ETS that had been withheld, and that Brown & Williamson attorneys were involved in the management of the research projects (Hanauer et al. 1995). When on April 14, 1994, the chief executive officers of the seven leading U.S. tobacco companies testified under oath before a congressional subcommittee—and a large television news audience—that they did not believe that nicotine was addictive, the industry's public credibility plummeted. Suddenly the industry appeared to millions of people, including plaintiffs' attorneys, as dishonest, disreputable, and legally vulnerable (Daynard 1994a; *Seattle Post-Intelligencer* 1994; see "Nature, Extent, and Focus of the Criminal Investigation," later in this chapter).

Further revelations about the tobacco industry's knowledge of the harmfulness of smoking and the addictiveness of nicotine, as well as about the industry's misbehavior, subsequently surfaced in several forms:

- Philip Morris documents indicated that the company's researchers studied and wrote about the pharmacologic effects of nicotine on smokers (Hilts and Collins 1995).
- Documents obtained from Brown & Williamson and its parent, British-American Tobacco Company, were analyzed (Hanauer et al. 1995).
- Investigative journalists obtained documents from R.J. Reynolds Tobacco Company (Levy 1995).
- In November 1995, Dr. Jeffrey Wigand, Brown & Williamson's former vice president for research, testified under deposition (*Tobacco Products Litigation Reporter* 1995c).
- Sworn statements were given to the FDA (first made public on March 18, 1996) in which three former Philip Morris employees (Ian L. Uydess, Ph.D., a former associate senior scientist; Jerome Rivers, a shift manager at a cigarette manufacturing plant in Richmond, Virginia; and William A. Farone, Ph.D., the director of applied research at Philip Morris' tobacco unit) stated that Philip Morris not only believes it is in the nicotine delivery business but also controls nicotine levels in its brands (*Tobacco Products Litigation Reporter* 1996a,b,c).
- The FDA analyzed both the public evidence and the additional evidence that its investigators gathered about the tobacco industry's past and present knowledge of, and behavior toward, the addictive quality of the nicotine in its products (*Federal Register* 1995b).
- On March 20, 1997, Liggett Group Inc., the smallest domestic cigarette manufacturer, admitted that nicotine was addictive and that the industry had targeted minors. Liggett turned over incriminating industry documents to the attorneys general and class action attorneys whose cases the company had agreed to settle (*Attorneys General Settlement Agreement, cited in* 12.1 TPLR 3.1 [1997]).
- Beginning in 1997, first hundreds, then thousands, and finally millions of industry documents began to surface after being uncovered through the discovery process in litigation by the Minnesota attorney general and Blue Cross and Blue Shield. These documents began appearing on Internet Web sites of the Commerce Committee of the U.S. House of Representatives (http://www.house.gov/commerce), Minnesota Blue Cross and Blue Shield (http://www.mnbluecrosstobacco.com), and the Minnesota District Court (http://www.courts.state.mn.us/district). The analysis of these documents has only begun, but they appear to support a wide range of legal claims against the industry.

This third wave of tobacco litigation is more diverse than its predecessors, in part because of the new wealth of factual information available to plaintiffs' attorneys. The series of revelations described above has generated a new set of allegations. For example, the industry has consistently claimed that nicotine is not pharmacologically active, that it is not addictive, and that anyone who smokes makes a free choice to do so. But as was made clear by the FDA's 1995 Statement of Jurisdiction over cigarettes as drug-delivery devices; the documents of Philip Morris Companies Inc., Brown & Williamson–British-American Tobacco Company, and R.J. Reynolds Tobacco Company relating to nicotine; and the information being provided by whistle-blowers such as Jeffrey Wigand and Ian Uydess, the industry was well aware of the pharmacologically active, addictive, and harmful nature of its products and was not forthright with its customers, the public, and public authorities about these facts. There is also evidence that the industry understood its consumers' need for adequate nicotine to sustain their addictions and that the industry designed its products accordingly.

The tobacco industry also has claimed that there is no definitive proof that smoking causes diseases such as cancer and heart disease. Yet the discovered company documents show that by the 1960s various tobacco companies had proved in their own laboratories that cigarette tar causes cancer in laboratory animals (Daynard and Morin 1988; Hanauer et al. 1995). Finally, the industry has claimed that it is committed to determining the scientific truth about the health effects of tobacco by conducting internal investigations and by funding external research. However, the Brown & Williamson–British-American Tobacco Company documents indicate that rather than conducting objective scientific research, Brown & Williamson attorneys have been involved in selecting and disseminating information from internal as well as external scientific projects for decades. An example of the latter is the industry's misrepresenting the work of the Council for Tobacco Research as objective scientific research on smoking and health. All research findings from this council are sent through the industry's attorneys, thereby gaining the protection of attorney-client privilege and potentially enabling the industry to choose which findings it will release and how it will present those findings to the public. The potential for this practice was suggested when certain Brown & Williamson–British-American Tobacco Company documents were found to include directions for disposing of damaging documents held by the company's research department (Hanauer et al. 1995). This conduct by the industry arguably misled the public and caused them to buy tobacco products; it also deflates the free choice argument the tobacco industry has used to deter further government regulation of its products and to defend itself in products liability lawsuits (Hanauer et al. 1995).

The information outlined above has generated a host of claims put forward by plaintiffs in the third wave of tobacco litigation. Some of these are similar to claims raised in the first two waves but have a much fuller factual support. These common-law (judge-created) legal theories include fraud, fraudulent concealment, and negligent misrepresentation; negligence; negligent performance of a voluntary undertaking; breach of express and implied warranties; strict liability; and conspiracy. Other, statutory (statute-created) claims new to tobacco litigation include violation of consumer protection statutes, antitrust claims, unjust enrichment/indemnity, and civil violations that invoke prosecution under the federal Racketeer Influenced and Corrupt Organizations Act (Kelder and Daynard 1997).

Common-Law Claims

An illustrative use of currently available evidence to support a common-law legal theory of fraudulent misrepresentation is Count Five of the complaint filed in April 1998 by 21 Blue Cross and Blue Shield plans against the tobacco industry (*Blue Cross and Blue Shield of New Jersey v. Philip Morris* [E.D.N.Y. Apr. 29, 1998], *cited in* 13.2 TPLR 3.51 [1998]). Among the allegations listed in Count Five are the following (*Blue Cross and Blue Shield*, p. 3.95):

> 301. Defendants represented and promised to those who advance and protect the public health and provide or pay for health care and health care services that they would discover and disclose all material facts about the effects of cigarette smoking and other tobacco product use on human health, including addiction.
>
> 302. Defendants have made and continue to make representations, statements and promises about the safety of cigarettes, other tobacco products and nicotine in general and their effect on human health and addiction. Such representations, statements and promises were and remain materially false, incomplete and fraudulent at the time Defendants made them, and Defendants knew or had and continue to have reason to know of their falsity. Only Defendant Liggett has recently conceded that the nicotine in cigarettes is addictive;

Liggett made this admission for the first time only in March 1997.

303. In testimony before Congress in January 1998, executives of other Tobacco Companies tried to have it both ways concerning the question of addiction. They stated that they personally did not think nicotine was addictive, but conceded that under some definitions, it would be considered addictive.

304. In view of the documentary record establishing that the Tobacco Companies have known for years with certainty that nicotine is addictive, such testimony is dishonest and part of an on-going attempt to disseminate false and misleading information.

305. At all relevant times Defendants intentionally, willfully or recklessly misrepresented material facts about the human health hazards of tobacco use, including addiction, and the association of cigarette smoking and other tobacco product use with various diseases of the heart, lung and other vital organs.

306. Because of Defendants' secret internal research, Defendants' knowledge of the material facts about tobacco use, health and addiction was and is superior to the knowledge of the BC/BS [Blue Cross and Blue Shield] Plans' members who purchased, used and consumed the Tobacco Companies' cigarettes and other nicotine tobacco products. Defendants' knowledge of the material facts about tobacco use, health and addiction was and is also superior to that of the BC/BS Plans, which undertook to provide health care financing for their members. Public access to these facts is limited because such facts are exclusively within Defendants' control.

313. The BC/BS Plans reasonably and justifiably relied on Defendants' materially false, incomplete and misleading representations about tobacco use, health and addiction. As a result of such reliance, the BC/BS Plans did not take, or would have taken sooner, actions to minimize the losses resulting from tobacco-related injuries and diseases and to discourage and reduce cigarette and other nicotine product use and the costs associated therewith by the BC/BS Plans' members.

314. As a direct, foreseeable and proximate result of the foregoing conduct of Defendants, the BC/BS Plans have suffered damages through payments for the costs of medical care due to smoking.

315. As direct and proximate result of Defendants' fraudulent misrepresentations and nondisclosures, the BC/BS Plans have suffered and will continue to suffer substantial injuries and damages for which the BC/BS Plans are entitled to recovery, and for which Defendants are jointly and severally liable.

Statutory Claims

The newer claims include a variety of theories based on federal and state statutes. As with the common-law claims, these statute-based actions are illustrated in the April 1998 complaint that 21 Blue Cross and Blue Shield plans filed against the tobacco industry.

Consumer Protection

Consumer protection claims are based on state statutes, which vary somewhat from state to state but generally forbid unfair methods of competition and unfair or deceptive acts or practices in commerce. A typical set of consumer protection allegations is that of Blue Cross and Blue Shield of Florida (*Blue Cross and Blue Shield*, p. 3.102). It makes the following allegations:

378. In the conduct of trade or commerce, Defendants have engaged and do engage in unfair methods of competition, unconscionable acts or practices and unfair or deceptive acts or practices including but not limited to the following:

a. Intentionally, willfully and knowingly seeking to addict persons, including BC/BS Florida members and their children, to the use of hazardous cigarettes and other nicotine tobacco products, knowing that such addiction physically changes and damages smokers' brain structures and creates and constitutes a substantial unfair impediment or interference in the smokers' ability to choose whether to continue smoking, making the transaction no longer an arm's length one between an equally willing buyer and seller, which is similar to many other deceptive and/or unfair devices

and practices that affect bargaining power or relative information;

b. Targeting people with deceptive advertising by misrepresenting the characteristics, ingredients, uses or benefits of Defendants' tobacco products; and

c. Engaging for decades in a wide variety of misrepresentations and fraudulent concealment of material facts, directly or by implication, including but not limited to: (1) misrepresentations and fraudulent concealment of the addictive nature of nicotine and of the adverse health consequences of nicotine tobacco products; (2) misrepresentations and fraudulent concealment about Defendants' ability to manipulate and their practice of manipulating nicotine levels and the addictive qualities of nicotine tobacco products; (3) misrepresentations that the Defendants would provide the public and governmental authorities with objective, scientific information regarding cigarettes and other tobacco products; (4) fraudulent concealment of certain aspects of cigarettes and other tobacco products, including the availability of safer, less-addictive products as a substitute to cigarettes and other tobacco products; (5) causing a likelihood of confusion about the source, sponsorship, approval or certification of cigarettes and other tobacco products; (6) misrepresenting that nicotine tobacco products have sponsorship, approval, characteristics, ingredients or benefits that they do not have and that Defendants knew that they did not have; (7) misrepresenting that cigarettes and other tobacco products were of a particular quality or grade, when Defendants knew that they were not; (8) engaging in unconscionable trade practices; (9) fraudulently promoting filter and low-tar cigarettes as safer; (10) fraudulently manipulating scientific research into the health hazards of smoking; and (11) fraudulently creating their "research councils" and using them to spread false information about their products and to promote false information that cigarettes or other tobacco products were safe or that adverse health effects had not been established.

379. The conduct described above and throughout this Complaint constitutes deceptive and unfair methods of competition, unconscionable acts or practices and unfair or deceptive acts or practices all impacting the public interest, in violation of Fla. Stat. § [section] 501.204.

380. As a direct and proximate result of such wrongful activity, BC/BS Florida has suffered losses and will continue to suffer substantial losses and injuries to its business or property, including but not limited to its being required to pay and paying the costs of medical care for disease, illness, addiction and adverse health consequences caused by cigarettes and other tobacco products.

Antitrust

The federal government and most states have antitrust laws. These are designed to prevent businesses in the same industry from cooperating in ways that deprive consumers or other entities of benefits they would otherwise receive from a competitive marketplace.

Count Three of the complaint by the 21 Blue Cross and Blue Shield plans explains how antitrust theory applies in a tobacco case (*Blue Cross and Blue Shield*, p. 3.93):

281. Since the early 1950s, and continuing until the present date, the Defendant Tobacco Companies, aided and abetted by the other Defendants herein, have violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by entering into, adhering to and continuing to observe the terms of a combination or conspiracy in unreasonable restraint of trade and commerce in the market for cigarettes in the United States. Such illegal concerted action has eliminated commercial competition that would have existed but for the conspiracy. Specifically, Defendants have conspired: (1) to suppress innovation and competition in product quality by agreeing not to engage in research, development, manufacture and marketing of less harmful cigarettes and other nicotine products; (2) to suppress output in a market, and to engage in concerted refusal to deal, by agreeing to keep at zero the output of less harmful cigarettes and other nicotine products; and (3) to suppress competition in marketing by agreeing not to take business from one another by making claims as to the relative safety of particular brands, whether or not such claims would have been truthful. But for the conspiracy, competition in the market for cigarettes in the United States would have been far more

vigorous, and consumers and others would have reaped enormous benefits.

282. But for the conspiracy, one or more of the Tobacco Companies would have developed a commercially successful, less harmful cigarette; such a cigarette would have garnered a substantial share of the cigarette market; and those who used that product rather than conventional cigarettes would have had significantly fewer health problems. As a consequence of the above, the BC/BS Plans would have incurred substantially lower costs.

283. A relevant market in which Defendants' violations occurred is the manufacture and sale of cigarettes and other nicotine products in the United States. Because, inter alia, such products are physically addictive, they are not reasonably interchangeable with other consumer products, nor are they characterized by cross-elasticity of price with other consumer products. Within this broad relevant market there would have existed, but for Defendants' conspiracy, a relevant submarket for the manufacture and sale in the United States of less harmful cigarettes and other nicotine products which would still have delivered nicotine but which would have had materially less deleterious health effects than the products actually manufactured and sold by Defendants. Such products would have proven attractive to many smokers, who would have chosen to buy them if they had been available.

284. Because Defendants have conspired to suppress output of less harmful cigarettes and other nicotine products, and to refuse to deal in such products, their conduct is unreasonable per se under the Section 1 of the Sherman Act. There is, moreover, no colorable justification for the concerted action alleged herein, which is unrelated to any lawful business transaction, does not promote efficiency, does not advance the interests of consumers and does not promote interbrand or intrabrand competition.

285. Antitrust law protects competition over innovation and product quality just as it protects price competition. Defendants willfully violated antitrust law by agreeing to suppress competition related to the safety of their products. It was clearly foreseeable that this antitrust violation would injure smokers' health, and it was just as foreseeable that the violation would, at the same time, cause those financially responsible for smokers' health care to suffer an injury in their business or property, by paying increased costs and expenses for health care services and products. These two kinds of injury are inextricably intertwined. Each flows directly from the anticompetitive effects of the illegal conduct. The harm suffered by the BC/BS Plans is the precise type of harm that a conspiracy to suppress competition related to product safety would be likely to cause. Accordingly, this harm reflects the anticompetitive effects of the violation.

Antitrust violations permit the injured party to receive treble damages as well as attorneys' fees.

Federal Racketeer Influenced and Corrupt Organizations (RICO) Act

The federal government and some states have statutes designed to control or eradicate "racketeer influenced and corrupt organizations." "Racketeering" is defined as a pattern of violations of specified criminal statutes ("predicate acts") (18 U.S.C. section 1961[1]). Among these statutes are those criminalizing mail and wire fraud (18 U.S.C. sections 1341, 1343). The evidence put forth that the industry committed these predicate acts is similar to the evidence that it committed common-law fraud (*Blue Cross and Blue Shield*, p. 3.88, para. 260[a]):

> The Defendants engaged in schemes to defraud members of the public, including the BC/BS Plans and their members, regarding the health consequences associated with using nicotine tobacco products. Those schemes have involved suppression of information regarding the health consequences associated with smoking, as well as fraudulent misrepresentations and omissions reasonably calculated to deceive persons of ordinary prudence and comprehension. Defendants' misrepresentations and fraudulent concealment of material facts, directly or by implication, include but are not limited to the following: misrepresentations and fraudulent concealment of the addictive nature of nicotine and the adverse health consequences of tobacco products; misrepresentations that such health effects of addictiveness were unknown or unproven; misrepresentations about Defendants' ability to manipulate and about the manipulation of nicotine levels and the addictive qualities of cigarettes; misrepresentations that

> they would provide the public and governmental authorities with objective, scientific information regarding all phases of smoking and health; and fraudulent concealment of certain aspects of smoking and health, including the availability of safer cigarettes and less addictive cigarettes. Defendants executed or attempted to execute such schemes through the use of the United States mails and through transmissions by wire, radio and television communications in interstate commerce.

The federal RICO Act makes it unlawful to receive income derived, directly or indirectly, from a pattern of racketeering activity or to participate, directly or indirectly, in the conduct of an enterprise's affairs through a pattern of racketeering activity. The relevance of the RICO Act to tobacco litigation was also delineated in the Blue Cross and Blue Shield plans' complaint (*Blue Cross and Blue Shield*, p. 3.92):

> 271. At all relevant times, the Tobacco Institute, CTR (formerly TIRC) and STRC [the Smokeless Tobacco Research Council] have constituted an enterprise within the meaning of 18 U.S.C. § 1961(4) or, in the alternative, each Defendant has constituted an enterprise within the meaning of 18 U.S.C. § 1961(4). Each enterprise is an ongoing organization. Each enterprise and its activities affect interstate commerce in that the enterprise is engaged in the business of maximizing the sales of cigarettes and other nicotine products.
>
> 272. As alleged above, Defendants have engaged in a pattern of racketeering activity that dates from 1953 through the present and threatens to continue into the future. These racketeering acts generated income for Defendants because they contributed to: the suppression and concealment of scientific and medical information regarding the health effects of nicotine products; the suppression of a market for alternative safer or less addictive tobacco products; the manipulation of nicotine to create and sustain addiction to Defendants' products; the targeting of teenagers and children and minorities with marketing and advertising designed to addict them, all to protect and ensure continued sales of Defendants' unsafe and addictive tobacco products; and the avoidance and shifting of smoking related health care costs to others including the BC/BS Plans by the methods stated above, including illicit litigation tactics such as unfounded claims of attorney-client privilege and other means.
>
> 273. Defendants have used or invested their illicit proceeds, generated through the pattern of racketeering activity, directly or indirectly in the acquisition of an interest in, or in the establishment or operation of each enterprise, in violation of 18 U.S.C. § 1962(a). Defendants' use and investment of these illicit proceeds in each enterprise is for the specific purpose and has the effect of controlling the material information distributed to the public concerning the health effects of smoking; suppressing and concealing scientific and medical information regarding the adverse health effects of smoking and the alternatives of safer or less-addictive cigarettes; devising means for manipulating nicotine to create and sustain addiction to Defendants' products; directing marketing and advertising toward minorities, teenagers and children to addict them; and enticing more individuals to smoke or to use Defendants' unsafe nicotine tobacco products.
>
> 274. Each Defendant also conspired to violate 18 U.S.C. § 1962(a), in violation of 18 U.S.C. § 1962(d). As detailed above, the conspiracy began in 1953, continues to the present and threatens to continue into the future. The object of the conspiracy was and is to protect the Tobacco Companies' business operations by investing their illicit proceeds, generated through a pattern of racketeering activity, in each enterprise. Each Defendant agreed to join the conspiracy, agreed to invest racketeering-generated proceeds in each enterprise in order to continue enterprise operations and agreed to the commission of and knowingly participated in at least two predicate acts within ten years of each other. Each Defendant knew that those predicate acts were part of racketeering activity that would further the conspiracy.
>
> 275. Defendants' violations of 18 U.S.C. §§ 1962 (a) and (d) have proximately caused direct injury to the business and property of the BC/BS Plans because the BC/BS Plans have been required to incur significant, concrete financial costs and expenses attributable to tobacco-related diseases; have been unable to participate in a market for alternative less harmful or less addictive nicotine products, or to advise, suggest, promote, subsidize or require their members to use alternative products such as safer or less addictive tobacco products or other nicotine delivery devices; and have not been as effective as they would otherwise have been in helping their members not to use hazardous tobacco

> products. In absence of the Defendants' violation of 18 U.S.C. §§ 1962 (a) and (d), these costs and expenses would have been substantially reduced.

Finally, the RICO Act provides a civil remedy for entities that have been financially injured as a result of RICO violations (18 U.S.C. section 1964[c]). As with the antitrust laws, the remedy includes treble damages and the recovery of attorneys' fees.

Taken together, the allegations in the case brought by the 21 Blue Cross and Blue Shield plans provide an important summary of the legal approaches that are now available to plaintiffs but were not available to earlier third-wave cases.

Individual Third-Wave Cases

Some third-wave cases involve only minor modifications of standard second-wave product liability claims by individual smokers against cigarette makers. In September 1995, one such case achieved the distinction of being the first clear plaintiff's victory after *Cipollone*. A state court jury awarded $2 million, including $700,000 in punitive damages, to a smoker who had developed mesothelioma (a cancer associated with asbestos exposure) after smoking asbestos-filtered Kent cigarettes in the 1950s. The defendant had won four of these filter cases since 1991. While awaiting appeals, observers speculated whether the result signified a change in public perceptions (Hwang 1995a; MacLachlan 1995c). Ultimately, the jury's awards of both compensatory and punitive damages were upheld on appeal (*Horowitz v. Lorillard Tobacco Co.*, No. 965-245 [Super. Ct. San Francisco Cty. 1995], *cert. denied*, 118 S. Ct. 1797 [1998]).

In what is perhaps the most important damage recovery case to date (*Tobacco Products Litigation Reporter* 1996d), on August 9, 1996, a jury in Jacksonville, Florida, awarded $750,000 to Grady Carter, a former air traffic controller who smoked from age 17 in 1947 until cancer was diagnosed in 1991. Grady and his wife, Mildred, sued Brown & Williamson Tobacco Corporation on the grounds of negligence and strict liability. The jury found that the Lucky Strike cigarettes that were manufactured by the defendant were "unreasonably dangerous and defective" (*Tobacco Products Litigation Reporter* 1996d, p. 1.114). Of special significance was that the plaintiff's attorney did not have to undergo the burdensome discovery process that industry attorneys had used successfully in the past. The means of avoiding this process was a special court order issued to ease the management of the large number of tobacco liability cases filed in that jurisdiction (*In re Cigarette Cases* [Fla., Duval Cty. Jan. 23, 1996], *cited in* 11.1 TPLR 2.3 [1996]; Ward 1996). Doubt was cast on the impact of the case, however, when a Florida appellate court overturned the jury's findings on the basis that the plaintiff had failed to file his claim within Florida's four-year statute of limitations (*Brown & Williamson Corp. v. Carter*, No. 96-4831, 1998 Fla. App. LEXIS 7477 [Fla. Dist. Ct. App. June 22, 1998]).

In an individual damage recovery action similar to *Carter* and brought by Norwood Wilner (the same plaintiff attorney who had successfully argued the *Carter* case), a jury found Brown & Williamson Tobacco Corporation liable for the wrongful death of smoker Roland Maddox and awarded his family just over $1 million in compensatory and punitive damages (*Widdick/Maddox v. Brown & Williamson Tobacco Corp.*, No. 97-03522-CA, Div. CV-H [Fla. 4th Cir. Jacksonville 1998]). Attorney Wilner has taken two other tobacco cases to trial that have resulted in jury verdicts for the defense, and it is estimated that he had 150 additional cases pending as of July 1998 (*Connor v. R.J. Reynolds Tobacco Co.*, No. 95-01820-CA, Div. CV-H [Fla. Cir. Duval Cty. May 5, 1997]; *Karbiwnyk v. R.J. Reynolds Tobacco Co.*, No. 95-04697-CA, Div. CV-H [Fla. Cir. Duval Cty. Oct. 31, 1997]; *Economist* 1998).

The growth of individual tobacco litigation during the third wave has been exponential. For example, R.J. Reynolds Tobacco Company reported in July 1995 that 68 cases of all sorts were pending against it; the number had risen to 203 cases in July 1996 and to 448 cases as of August 7, 1997 (Daynard 1997).

Aggregation Devices

The third wave got much of its impetus from the use of procedural devices and legal theories that aggregated claims. Aggregation raised the potential value of each case for plaintiffs' attorneys, increasing their willingness to invest large amounts of money and time in pursuing them. This process denied the industry the ability to discourage such cases by escalating litigation costs, a strategy that had served it well during the previous two waves of tobacco litigation (see "The Aftermath of the First Two Waves," earlier in this chapter). The most important of these aggregation devices have been class actions and third-party payer reimbursement actions.

Class Actions

The class action device figures prominently in the third wave of tobacco litigation. This set of procedures

enables a group of persons suffering from a common injury to bring a suit to secure a definitive judicial remedy for that injury on behalf of all members of the group. Class action procedures have two principal forms--one for cases that seek a single remedy for the common benefit of a category of plaintiffs (Federal Rules of Civil Procedure, Rule 23[b][1]), and a somewhat more complicated one known as (Rule 23[b][3] procedures) for cases that seek the resolution of a large number of individual claims that share common factual or legal issues (Federal Rules of Civil Procedure, Rule 23[b][3]).

Tobacco class actions have, in the main, raised two types of issues. One type, exemplified by the claims in the *Castano* case (*Castano v. American Tobacco Co.*, No. 94-1044 [E.D. La. Feb. 17, 1995], *cited in* 10.1 TPLR 2.1 [1995], *rev'd* 84 F.3d 734 [5th Cir. 1996]) and its progeny, seeks recovery for the cost of treating addicted smokers for their addictions and for monitoring their medical condition for signs of impending disease. It does not, however, seek recovery for the cost of treating tobacco-caused diseases, nor for the other costs (tangible or intangible) to smokers and their families that flow from tobacco-caused disease. The other type of issue, exemplified by the claims in the *Engle* case (*Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273 CA [20] [Fla., Dade Cty. Oct. 31, 1994], *cited in* 9.5 TPLR 2.147 [1994], *aff'd* 672 So. 2d 39 [1996]), seeks damages for the full range of costs that flow from tobacco-caused diseases. The *Castano* case involves a much larger number of plaintiffs than *Engle*, but each plaintiff seeks a much smaller recovery.

To date, both *Castano*- and *Engle*-type claims have been brought under the more complex Rule 23(b)(3) class action procedures designed for the resolution of individual claims that share common legal or factual issues. Courts have generally been reluctant to allow these procedures for *Castano*-type claims, with the courts particularly concerned about the individualized proceedings on behalf of millions of addicted smokers, each making relatively small claims, that would follow from a favorable resolution of the common issues (*Castano v. American Tobacco Co.*, 84 F.3d 734 [5th Cir. 1996]; *Small v. Lorillard Tobacco Co.*, 1998 WL 398176 [N.Y.A.D. 1 Dept. July 16, 1998]; *Barnes v. American Tobacco Co.*, No. 96-5903 [E.D. Pa. Aug. 22, 1997], vacated 176 F.R.D. 479 [1997], *cited in* 12.4 TPLR 2.227 [1997]). The possibility of using the simpler class action procedure for *Castano*-type claims, which would seek a single judicial order setting up an insurance-type fund that claimants could draw on as they used addiction-related medical or pharmaceutical services, has not been fully explored. By contrast, courts have been more willing to permit Rule 23(b)(3)-type procedures for *Engle*-type claims, where class action procedures promise to simplify the trials of a smaller (but still very large) number of serious individual claims (*Engle*, 672 So. 2d 39; *Broin v. Philip Morris Cos.*, No. 92-1405 [Fla., Dade Cty. Mar. 15, 1994], *cited in* 9.1 TPLR 2.1 [1994]; *Richardson v. Philip Morris, Inc.*, No. 96145050/CE212596 [Md. Cir. Ct. Baltimore City Jan. 28, 1998]).

For a class action of either type to be certified, four technical requirements must be met. First, the members of the proposed plaintiff class must be so numerous that joining each plaintiff to the suit would be impractical. Second, the claims of each member of the class must turn on some questions of law or fact that are common to all the members of the class. Third, claims of the class representatives must not be antagonistic to those of the other members of the class. Fourth, the representative plaintiffs and their attorneys must be able to fairly and adequately represent the interests of the entire class (Federal Rules of Civil Procedure, Rule 23[a]). Where members of the class have conflicting interests, the class may be divided into subclasses represented by different attorneys (Federal Rules of Civil Procedure, Rule 23[c][4][A]).

Besides meeting these four requirements, a Rule 23(b)(3) class action needs to surmount two other significant hurdles. First, the court must determine that the action is "manageable," meaning that a reasonable plan for trying the entire case, including the individual claims, can be devised. Second, the common issues must "predominate" over the individual issues, leaving the court to make the judgment whether the benefits likely to be obtained from trying the case as a class action outweigh the difficulties likely to be encountered in doing so (Federal Rules of Civil Procedures, Rule 23[b][3]).

Once a Rule 23(b)(3) class is certified, the class representatives must undertake the onerous and expensive process of notifying each member of the class. This is necessary because Rule 23(b)(3) class members have the significant right to opt out of the class and pursue their claims individually.

The class action device solves the problem of aggregation, reduces the imbalance of resources often found between the parties, achieves economies of scale and avoids duplicative litigation. The great advantage of the class actions being pursued in the third wave of tobacco litigation is that resources are expended on behalf of thousands or millions of class members rather than on behalf of a single individual (Kelder and Daynard 1997). This advantage provides more of a level playing field and means that the

tobacco companies will not be able to successfully pursue their usual first- and second-wave strategy of forcing opponents to spend exorbitant sums of money until, nearly bankrupted, they are forced to withdraw (Kelder and Daynard 1997). In its unanimous decision, the appellate court in *Broin*, after considering and rejecting defense objections to the plaintiffs' request for class certification, alluded to the great promise that the class action strategy holds for plaintiffs challenging the tobacco industry: ". . . if we were to construe the rule to require each person to file a separate lawsuit, the result would be overwhelming and financially prohibitive. Although defendants would not lack the financial resources to defend each separate lawsuit, the vast majority of class members, in less advantageous financial positions, would be deprived of a remedy. We decline to promote such a result" (*Broin, cited in* 9.1 TPLR 2.4).

But with these benefits come new problems. Only common issues can be dealt with in a class proceeding, thus leaving individualized features to be dealt with in separate trials. As noted, some or many potential class members may choose to opt out of the class to pursue individual cases, thereby reducing the advantage of eliminating duplicative litigation. If some class members are more severely injured than others, intractable conflict may arise over distributing the proceeds (Coffee 1986, 1987). If the injury is continuing outside the class, as it is in the case of tobacco use, there is the problem of providing for future plaintiffs (Hensler and Peterson 1993). These problems are overlaid and compounded by issues involving the legal agents representing the plaintiffs. Class actions are organized and managed by entrepreneurial lawyers, and their interests and those of the client class may diverge (Coffee 1986). Finally, there is the danger that the class action device elevates the stakes so high that defendants and plaintiffs settle without resolution of other (nonmonetary) merits of the claim. Just which of these problems are sufficiently salient to discourage use of the class action device in the several varieties of tobacco cases is still an issue.

Castano v. American Tobacco Co., filed March 29, 1994, in federal court in New Orleans (MacLachlan 1994–95), was an unparalleled attempt by a coalition of traditional plaintiffs' lawyers, mass disaster lawyers, and class action specialists from around the country to diminish the organizational advantages enjoyed by the tobacco industry during the first two waves of tobacco litigation. Each of a coalition of 62 law firms pledged $100,000 annually to fund a massive class action suit, on behalf of millions of nicotine-dependent smokers, charging the tobacco industry with promoting addiction and thus disabling smokers from quitting (Janofsky 1994a; Shapiro 1994a; Curriden 1995). The plaintiffs requested damages for economic losses and emotional distress, as well as medical monitoring and injunctive relief. In February 1995, the district court granted the plaintiffs' request for class certification conditionally and in part (*Castano, cited in* 10.1 TPLR 2.1). Judge Okla Jones II granted certification for issues of fraud, breach of warranty (express or implied), intentional tort, negligence, strict liability, and consumer protection issues. Certification was denied for other issues, including the questions of causation, injury, and defenses regarding the claims of each smoker.

Normally, a trial judge's decision to certify a class is not subject to review by a higher court until the trial court has reached a final disposition of the whole case, which may be years later. But Judge Jones in *Castano* granted special permission to allow the defendants to appeal his class certification decision to the United States Court of Appeals for the Fifth Circuit (Collins 1995c). On May 23, 1996, a three-judge panel of the appellate court vacated Judge Jones' decision and remanded the case back to the district court with instructions to dismiss the class action. The court of appeals reasoned that the variations in the state laws of the 50 states in which the injuries occurred classwide, combined with trial management problems not addressed by the district court, justified decertification of the nationwide class (*Castano*, 84 F.3d 734).

The coalition of lawyers that formed around *Castano* opted to pursue another approach and began to file statewide class actions shortly after the decertification by the court of appeals. By mid-1998, the coalition had filed 26 such cases (Torry 1998).

Another class action, *Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273 CA (20) (Fla., Dade Cty.), *cited in* 9.3 TPLR 3.293 (1994), filed in a Florida state court May 5, 1994, on behalf of smokers suffering from "diseases like lung cancer and emphysema," sought billions of dollars in damages from the seven leading tobacco companies, the Council for Tobacco Research U.S.A. Inc., and the Tobacco Institute, a tobacco-financed public relations association (Janofsky 1994a, p. 11). The suit alleged that by denying that smoking is addictive and by suppressing research on the hazards of smoking, the tobacco industry has deceived the public about the dangers of using tobacco products (Janofsky 1994c). On October 31, 1994, *Engle*, filed by a personal injury lawyer who chose to remain apart from the *Castano* coalition, had the distinction of becoming the first tobacco-related class action lawsuit to be granted class certification (*Engle v. R.J. Reynolds Tobacco Co.*, No. 94-08273 CA [20] [Fla., Dade Cty. Oct. 31, 1994], *cited in*

9.5 TPLR 2.147 [1994]). When the defendants sought to overturn the class certification, the Florida Supreme Court upheld it, paving the way for the case to go to trial (*R.J. Reynolds Co. v. Engle*, 672 So. 2d 39 [Fla. Ct. App. 1996]). A jury selection for the trial began on July 6, 1998 (*Economist* 1998).

Recovery Claims by Third-Party Health Care Payers

In the late 1970s, a number of scholars and advocates began urging legal theories and statutory reforms that would permit third-party health care payers to collect the expenses of caring for tobacco-caused disease from the manufacturers themselves (Garner 1977; Daynard 1993a,b, 1994a; Gangarosa et al. 1994). Such claims involve complex questions about ascertaining the amount of tobacco-caused injury and the apportionment of damages attributable to each defendant. The stakes in these potential cases are undoubtedly large: one study estimates that 7.1 percent of total medical care expenditures in the United States is attributable to smoking-related illnesses (CDC 1994c). Another study estimates that tobacco use is responsible for about 18 percent of all Medicaid expenses (Clymer 1994). However, calculation of such effects invites the counterargument (albeit amoral) that tobacco's costs to the state are offset in part by the savings afforded by the premature deaths of smokers (Geyelin 1995).

Beginning in 1994, the governments of three states—Minnesota, Mississippi, and West Virginia—as well as Blue Cross and Blue Shield of Minnesota, filed lawsuits to secure reimbursement from the tobacco industry for health care expenditures for ailments arising from tobacco use. Three years later, 41 states had filed such legal actions. Since this settlement has not yet been embodied in the congressional legislation necessary to give it the force of law (see "Legislative Developments" and "Master Settlement Agreement," earlier in this chapter), four states—Florida, Minnesota, Mississippi, and Texas—have settled their claims with the tobacco industry. Additional third-party payers—such as labor union pension funds and Blue Cross and Blue Shield plans (whose joint case is described in detail in "Common-Law Claims," earlier in this chapter) in states other than Minnesota—also began to file suit against the industry in 1997 and 1998.

Medicaid Reimbursement Cases

Mississippi filed suit on May 23, 1994, against tobacco manufacturers, wholesalers, and trade groups on the basis of common-law theories of restitution, unjust enrichment, and nuisance to recover the state's outlays for treating the tobacco-related illnesses of welfare recipients (Janofsky 1994a; Woo 1994c; *Moore v. American Tobacco Co.*, Cause No. 94:1429 [Miss., Jackson Cty. Feb. 21, 1995], *cited in* 10.1 TPLR 2.13 [1995]). The first state to do so, Mississippi, embraced a strategy that merited the attention of other third-party claimants. Rather than proceeding in a trial court on a theory of subrogation (whereby the state would have acted in the place of injured smokers to recover claims the state had paid to those smokers), *Moore* chose to proceed in equity (i.e., before a single judge in a nonjury proceeding) on theories of unjust enrichment and restitution (Kelder and Daynard 1997). *Moore*'s equity claims were grounded in the notion developed in the literature that the State of Mississippi had been injured directly by the behavior of the tobacco industry because Mississippi's taxpayers had been forced to pay the state's Medicaid costs due to tobacco-related illnesses.

The state planned to use statistical analysis to illustrate the percentage of Medicaid costs that can be attributed to tobacco use. If the lawsuit succeeded, the defendants would pay for Medicaid costs under a formula that calculates liability according to market share (Lew 1994). The lawsuit sought tens of millions of dollars in damages, including punitive damages as well as recovery for future tobacco-related expenditures (Woo 1994c). Lawyers from 11 private plaintiffs' law firms participated in the suit. Instead of promising the private lawyers a percentage of the potential damages, the state sought to compel the tobacco companies to pay the lawyers' fees (Woo 1994c).

Superficially, this state case (and that of other states) resembled subrogation claims, in which a party who pays a claim (typically an insurer) may pursue that claim, acting in the place of the original claimant and subject to the defenses that might be raised against him or her. But the Mississippi complaint avoided asserting the claims of the health care recipients; instead, it asserted the proprietary claims of the state as a health care funder (distinct from any claims of those whose health was injured by tobacco).

This proprietary stance is significant because, as detailed earlier in this section, the tobacco companies won many of the first- and second-wave cases by asserting the defenses of assumption of risk and contributory negligence or by asserting that the smoker's willfulness, not the industry's misbehavior, was the proximate cause of the smoker's smoking and consequent illness. These defenses should not be available to the tobacco industry in medical cost reimbursement

suits because these suits are not brought on behalf of injured smokers. They are brought, instead, on behalf of the states themselves to recover the medical costs they have been forced to pay to care for indigent smokers. The tobacco industry cannot plausibly argue that the states chose to smoke or that they contributed to the financial harm caused to them (Daynard 1994b; Kelder and Daynard 1997).

The decision in the Mississippi medical cost reimbursement suit demonstrates that this commonsense argument can prevail, even in states that lack special legislation that creates an independent cause of action for the state. The tobacco industry defendants in *Moore v. American Tobacco Co.* filed a motion for judgment on the pleadings on October 14, 1994. The defendants argued that, under Mississippi law, assignment/subrogation was the state's exclusive remedy for pursuing the recovery of medical benefits from potentially liable third parties. Further, the defendants argued that because Mississippi's counts for restitution, indemnity, and nuisance in the complaint did not assert a subrogation claim, they had to be dismissed. Alternatively, the defendants argued that the case should be transferred to a Mississippi circuit court, where thousands of jury trials would have to be conducted (Kelder and Daynard 1997).

In response, Mississippi Attorney General Mike Moore pointed out that "this 'remedy,' as the industry knows, would be cost prohibitive and exhaustive of our State's limited judicial resources" (*Moore v. American Tobacco Co.*, No. 94:1429 [Miss., Jackson Cty. Oct. 14, 1994], *cited in* 9.5 TPLR 3.597, 3.598 [1994]). He argued that "although the Medicaid Law did further codify the State's right to be subrogated, this right is in *addition* to, and not in derogation of, the State's statutory and common law remedies. There is no language in the Medicaid Law that implies an exclusive remedy, and well-settled rules of statutory interpretation require a construction that the Medicaid Law *expanded*, not contracted, the State's remedies [emphasis in original]" (p. 3.598).

On February 21, 1995, Chancellor William H. Myers, presiding over the Chancery Court of Jackson County, denied the tobacco industry defendants' motions to obtain a judgment on the pleadings and to remove the claim from the chancery court to a Mississippi circuit court. The court simultaneously granted the state's motion to strike the affirmative defenses of the defendants; the tobacco industry thus could not rely on the defenses of assumption of risk and contributory negligence, which have proved a mainstay in earlier battles—and which might have been allowed had the state proceeded on a theory of subrogation (*Tobacco Products Litigation Reporter* 1995a).

On July 2, 1997, Mississippi settled its claims so that it would receive at least $3.3 billion over 25 years, with annual payments of at least $135 million continuing in perpetuity. A provision of the settlement agreement guaranteeing Mississippi most favored nation (MFN) treatment, which meant that Mississippi would get the benefit of any better agreement that another state might achieve, was little noticed at the time but has since proved immensely important; additional settlement terms from later industry arrangements with the other three states have been granted to Mississippi.

The second state to bring suit against the tobacco industry was Minnesota (*Minnesota v. Philip Morris Inc.*, No. C1-94-8565 [Minn., Ramsey Cty. Nov. 29, 1994], *cited in* 9.3 TPLR 3.273 [1994]). Minnesota's suit alleged an antitrust conspiracy and an elaborate course of fraudulent behavior on the part of the defendants. Specifically, the tobacco companies were alleged to have violated the state's laws against consumer fraud, unlawful trade practices, deceptive trade practices, and false advertising, as well as violated the duty they voluntarily undertook to take responsibility for the public's health, to cooperate closely with public health officials, and to conduct independent research and disclose to the public objective information about smoking and health. The suit sought various damages, including restitution, forfeiture of tobacco profits, attorneys' fees, and treble damages for several statutory violations. Blue Cross and Blue Shield of Minnesota, the state's largest private medical insurer, joined as a co-plaintiff with the state (Woo 1994b). Like most other states that brought Medicaid reimbursement cases, Minnesota and the insurer retained private counsel to provide representation under a contingency fee arrangement.

Following a three-month trial and in the midst of closing arguments, Minnesota settled its case—the last of the four states to do so—on May 8, 1998. The industry agreed to pay about $6.1 billion to Minnesota and $469 million to Blue Cross and Blue Shield of Minnesota (which was also a plaintiff) over 25 years, an amount substantially larger proportionately than the three earlier state settlements, resulting in substantial increases in their settlement packages under the MFN clauses. The industry also agreed to the following public health concessions (*Minnesota v. Philip Morris Inc.*, *cited in* 13.2 TPLR 2.112):

- Disband the Council for Tobacco Research.

- Not pay for tobacco placement for movies (a provision that inherently extends beyond Minnesota's borders).
- Stop offering or selling in Minnesota nontobacco merchandise, such as jackets, caps, and T-shirts, bearing the name or logo of tobacco brands.
- Remove all tobacco billboards in Minnesota within six months and eliminate such ads on buses, taxis, and bus shelters.
- Refrain from targeting minors in future advertising and promotions.
- Refrain from misrepresenting the evidence on smoking and health.
- Refrain from opposing in Minnesota certain new laws designed to reduce youth tobacco use, as well as clean indoor air laws that could adversely affect the industry.
- Institute new lobbying disclosure rules for Minnesota.
- Release internal indexes to millions of previously secret industry documents, thereby providing a means for attorneys and researchers to find relevant information more easily.
- Maintain at industry expense for 10 years a depository of millions of tobacco documents in Minneapolis and another such depository in Great Britain.
- Instruct retailers in Minnesota to move cigarettes behind the counter to restrict minors' access to those cigarettes.
- Pay out $440 million in fees to the private attorneys who represented the plaintiffs.
- Give Minnesota its own MFN clause, limited to improved public health provisions in future state settlements.

Through the MFN process, many of the public health concessions that Minnesota obtained from the industry are also being incorporated in the prior state agreements (Branson 1998).

The Florida case (*Florida v. American Tobacco Co.*, No. 95-1466AO [Fla., Palm Beach Cty. Feb. 21, 1995], *cited in* 10.1 TPLR 3.1 [1995] [Complaint]; Geyelin 1995) was the first conforming with a statute tailored for the purpose of establishing such a claim. In May 1994, Florida amended this little-used statute, which provided for recovery by the state from third parties responsible for Medicaid costs, to permit the state to sue on behalf of the entire class of smokers on Medicaid, to use statistical proof of causation, to bar assumption of risk as a defense, and to permit recovery according to the defendants' share of the cigarette market (Rohter 1994; Woo 1994a). Apparently having second thoughts about the statute (which had passed by a wide margin), the state legislature considered repealing it, eliciting a vow from Florida's Governor Lawton Chiles to veto a repeal (Hwang 1995a). After an unsuccessful last-minute attempt by the tobacco companies to have the Florida Supreme Court bar state agencies from initiating a lawsuit under the statute, Florida filed its medical cost reimbursement suit on February 21, 1995, seeking $4.4 billion (*Florida, cited in* 10.1 TPLR 3.1; Geyelin 1995).

The complaint in the Florida lawsuit contains extended factual allegations regarding the defendants' knowledge (or lack of knowledge) about the harmfulness of tobacco. Raising the familiar causes of action, the complaint also emphasizes the tobacco industry's alleged violations of consumer protection laws. Specifically, it criticizes the industry's use of advertising to target minors.

The Florida Supreme Court narrowly upheld the liability law, on which the state's case is based, in a 4 to 3 ruling that produced equivocal results for both sides. The court agreed with the defendants that the state could only use the law to recover damages incurred since July 1, 1994, and that the names of individual Medicaid recipients would have to be supplied so that the tobacco companies could challenge their claims (*Agency for Health Care Administration v. Associated Industries of Florida*, 678 So. 2d 1239 [Fla. 1996]). But the majority decision left most of the law's key provisions intact. The presiding state circuit court judge, Harold J. Cohen, next ordered both parties to try to resolve the dispute by engaging in mediation, which broke off after four days and produced no results (Kennedy 1996). Judge Cohen then dismissed 15 counts of the state's 18-count claim against the tobacco industry in a ruling issued September 1996 (*Florida v. American Tobacco Co.*, No. CL 95-1466 AH [Fla., Palm Beach Cty. Sept. 16, 1996]). The following month, however, he rejected the defendants' request to depose the hundreds of thousands of Medicaid recipients supplied to the court by the state in compliance with the supreme court decision. The judge held that the hundreds of thousands of recipients need only be identified by case number, not by name (*Florida v. American Tobacco Co.*, No. CL 95-1466 AH [Fla., Palm Beach Cty. Oct. 18, 1996], *cited in* 11.7 TPLR 2.236 [1996]). In yet another setback for the defendants, Judge Cohen

permitted the state to add a count of racketeering to its claim (MacLachlan 1996–1997).

Florida settled its case on August 25, 1997, for at least $11 billion over 25 years, with annual payments of at least $440 million continuing thereafter. It obtained its own MFN clause, as well as an additional $200 million for a two-year initiative to reduce youth smoking, an agreement to ban cigarette billboards and transit advertisements, and an agreement by the industry to lobby for a ban on cigarette vending machines. As a consequence of Mississippi's MFN clause, Florida received similar benefits.

The Texas suit was innovative in that it was brought in federal rather than state court. The case was also the first to include claims under the federal RICO Act. On January 16, 1998, Texas settled its claims for at least $14.5 billion over 25 years, with annual payments of at least $580 million continuing thereafter, as well as public health provisions similar to those negotiated by Florida and its own MFN clause.

Although West Virginia was one of the first three states to file a suit against the tobacco companies, its case did not fare as neatly as those of Mississippi, Minnesota, and the later-arrived Florida and Texas. Filed on September 20, 1994 (*McGraw v. American Tobacco Co.*, No. 94-1707 [W.Va. Cir. Ct. Kanawha Cty. Sept. 20, 1994], *cited in* 9.4 TPLR 3.516 [1994]), West Virginia's suit named 23 defendants, including Kimberly-Clark Corporation, developer of a process once used in Europe—but never, according to a company spokesperson, in the United States—to control nicotine levels in tobacco products (Hwang and Ono 1995), and United States Tobacco Company, the largest manufacturer of chewing tobacco and snuff. The West Virginia action "asks the Court for damages to cover what West Virginia has paid providing medical care to people afflicted with tobacco-related illness, and what the state will pay in the future for tobacco victims. The lawsuit also seeks punitive damages to prevent a repetition of such conduct in the future" (West Virginia Attorney General 1994, p. 2). Citing an "intentional and unconscionable campaign to promote the distribution and sale of cigarettes to children," the complaint also requires that the defendants be enjoined from "aiding, abetting or encouraging the sale . . . of cigarettes to minors" (p. 4) and be fined $10,000 for each violation of the injunction. West Virginia's complaint is signed by lawyers from five private firms, including a prominent asbestos litigation firm that is also involved in the Mississippi case.

Unlike the Mississippi and Minnesota claims, the West Virginia case met with early difficulties. On May 3, 1995, Kanawha County Circuit Court Judge Irene C. Berger dismissed 8 of the suit's 10 counts, including fraud, misrepresentation, and conspiracy, as being outside of the state attorney general's powers. Ironically, Berger's decision is based in part on a decision that Attorney General Darrell V. McGraw Jr. himself, the named plaintiff in the suit, authored when he served on West Virginia's Supreme Court, holding that the state attorney general lacked common-law authority (i.e., he could bring only statutory claims). The two remaining counts of the West Virginia action dealt with consumer and antitrust charges (MacLachlan 1995a).

On May 13, 1996, Judge Berger permitted the West Virginia Public Employees Insurance Agency Finance Board to join as co-plaintiffs. This ruling "essentially revived" (*Mealey's Litigation Reports: Tobacco* 1996a) the case by providing the state with a means of hiring legal counsel after the tobacco companies won an October 1995 order barring the attorney general from retaining private law firms on a contingency fee basis (MacLachlan 1995a,b,c).

Among the numerous other states currently trying to recoup Medicare expenditures, Oklahoma stands out for an innovation in its suit. The Oklahoma suit names, among other defendants, three industry law firms: Shook, Hardy and Bacon of Kansas City, Missouri; Jacob, Medinger and Finnegan of New York; and Chadbourne and Parke of New York. Shook, Hardy and Bacon has represented tobacco companies since 1954 (Kelder and Daynard 1997). The suit accuses the law firms of helping the tobacco companies conceal the health risks of smoking and alleges they kept documents confidential by falsely claiming they were protected by attorney-client privilege (*Oklahoma v. R.J. Reynolds Tobacco Co.*, No. CJ961499L [Okla., Cleveland Cty. Aug. 22, 1996], *cited in* 11.7 TPLR 3.901 [1996]).

Other notable settlements mentioned earlier in this chapter include the Liggett Group Inc.'s 1997 settlement with most of the states, in return for a fraction of future profits, public admissions of the dangers and addictiveness of nicotine and the past misbehavior of the industry, and disclosure of secret industry documents (*Tobacco Products Litigation Reporter* 1997a). The same year brought in another key settlement—that of R.J. Reynolds Tobacco Company and a dozen California cities and counties, which had alleged that R.J. Reynolds' Joe Camel campaign was aimed at minors (see "A Critical Example: Joe Camel," earlier in this chapter). R.J. Reynolds agreed to discontinue the campaign in California and to give the plaintiffs $9 million for a counteradvertising campaign (*Mangini, cited in* 12.5 TPLR 3.349). In October 1997,

the industry settled the first phase of a class action brought on behalf of nonsmoking flight attendants for substantial money and other concessions (*Broin, cited in* 12.6 TPLR 3.397). This case is discussed in detail in "Claims of Nonsmokers," later in this chapter.

Finally, at the time of writing, a group of state attorneys were holding discussions about settling some or all of the remaining state cases. According to published reports, as a starting point "the states have decided to use the [public health] concessions gained by Minnesota as part of its $6.5 billion settlement" (Meier 1998a).

Other Third-Party Reimbursement Cases

Although the parties seeking recovery in Medicaid reimbursement cases are public officials, the cases are based on private law theories of recovery—that is, the officials proceed not as authoritative public regulators but as holders of rights conferred by the general law. Such use of private law recovery as an instrument of state policy suggests further possibilities of analogous suits by private funders of health care and may provide incentives for attorneys to organize such suits. Health insurers, widely seen as reluctant to enforce their rights to recoup from third parties, may be mindful of such opportunities in an increasingly competitive health care setting.

Indeed, Blue Cross and Blue Shield of Minnesota was a co-plaintiff with the State of Minnesota in its action against the tobacco industry. In 1996, the Minnesota Supreme Court unanimously rejected an industry challenge that co-plaintiff Blue Cross and Blue Shield could not remain in the case. This ruling permitted the insurance company and the state to pursue their claims directly against the defendants, rather than on behalf of individual smokers (*Minnesota v. Philip Morris Inc.*, 551 N.W.2d 490 [Minn. 1996]). When the industry settled with the State of Minnesota in May 1998, it also settled with Blue Cross and Blue Shield of Minnesota—for $469 million to be paid over a five-year period (Weinstein 1998a).

In March 1998, two Minnesota health maintenance organizations filed a separate suit against the industry, with claims paralleling those in the Minnesota case that was still in trial (Howatt 1998). The following month, Blue Cross and/or Blue Shield Plans in 37 states combined in three legal actions to sue the major tobacco companies and their public relations firms to recover damages allegedly caused by a conspiracy to addict their insurance plan members to cigarettes (e.g., *Blue Cross and Blue Shield, cited in* 13.2 TPLR 3.51; *National Law Journal* 1998).

These plans are alleging that tobacco companies conducted an "ongoing conspiracy and deceptive, illegal and tortious acts" that have resulted in the plaintiffs suffering "extraordinary injury in their business and property," having been required to expend many millions of dollars on costs attributable to tobacco-related diseases caused by defendants who "knowingly embarked on a scheme to addict millions of people, including members of the [Blue Cross and Blue Shield] Plans, to smoking cigarettes and other tobacco products—all with the intent of increasing their annual profits . . . [and forcing] others to bear the cost of the diseases and deaths caused by the conspiracy" (*Blue Cross and Blue Shield*, p. 3.52).

The plans allege a conspiracy to hide the health effects of tobacco products, violations of federal racketeering laws and of antitrust laws, and unjust enrichment, among other theories (*Tobacco Products Litigation Reporter* 1998). They request damages in the forms of payments for treatments of tobacco-related diseases, court orders to require corrections of unlawful behavior, damages in excess of $1 billion for past and future harm, and other forms of relief.

Bankruptcy trusts representing the interests of injured plaintiffs who have made claims against the asbestos industry filed suit against the tobacco industry in late 1997 (Bourque 1997). The trusts allege that they paid claims to victims of asbestos exposure whose injuries were substantially caused by either active or passive exposure to cigarette smoke. Alleging the unjust enrichment of the tobacco companies at the expense of the trusts, the latter seek to recover expenditures and payments made to the asbestos settlement class and seek punitive damages against the defendants (*Tobacco Products Litigation Reporter* 1997b).

The trusts allege that among persons exposed to asbestos, direct or indirect exposure to tobacco smoke is a substantial contributing factor in both the development of cancer and the frequency and severity of symptoms of asbestosis, a disease from which many asbestos workers suffer. The trusts also allege that tobacco companies knew or should have known that their products would cause these injuries (*Falise v. American Tobacco Co.*, No. 97-CV-7640 [E.D.N.Y. Dec. 31, 1997], *cited in* 12.8 TPLR 3.504 [1997]).

The asbestos trusts accuse the tobacco companies of suppressing the truth concerning the nature of their products and their carcinogenic effects. They allege that tobacco industry products were at least partly responsible for the illnesses suffered by asbestos plaintiffs. The trusts thus want the tobacco companies to pay a share of the billions of dollars in damages awarded to those plaintiffs (Bourque 1997).

Small Claims Tribunals to Recover the Cost of Quitting

Related to these expansive addiction suits are a series of more limited claims based on the addictive properties of cigarettes. As with large suits, small claims for the recovery of costs related to quitting tobacco use depend on whether judges and juries accept the addiction argument that underlies the product liability portion of the third wave of tobacco litigation. In this scaled-down version, claims for modest amounts might be brought in small claims courts, obviating some of the litigation advantages enjoyed by the manufacturers. In one case, an individual smoker sued Philip Morris Companies Inc. for $1,154 in a Washington State small claims court to recover the costs of consulting a doctor, buying nicotine patches, and joining a health club—all activities undertaken to help the plaintiff quit smoking cigarettes (Hayes 1993; Janofsky 1993). Because the court rejected the suit on the preliminary ground that the statute of limitations had expired, the substantive merits of the claim were not considered (Montgomery 1993).

In July 1998, an Australian appellate court allowed a formerly addicted smoker to proceed before the New South Wales consumer claims tribunal with a $1,000 claim for the cost of a stop-smoking program, as well as for mental suffering caused by the addiction and the effort to quit (Australian News Network 1998). Were a timely small claims case to succeed, the recovery would be small. Incentives for lawyers to supply and plaintiffs to consume the legal services needed to pursue such a claim might be provided by statutory provision allowing winning plaintiffs to recover attorneys' fees. Or if such claims could be sufficiently standardized and simplified, they might proceed without lawyers (e.g., by preparing "kits" to enable plaintiffs to represent themselves).

Other Cost Reduction Procedures

Several other procedures have been used or may be available to reduce the costs—for plaintiffs, their attorneys, and the courts—of resolving individual claims. One such procedure is to combine pretrial and perhaps trial proceedings for several, or even many, cases. In July 1998, a California court ordered that proceedings in a variety of actions pending in various California courts be combined (Associated Press 1998). Earlier, a Tennessee court ordered several pending individual cases to be combined for trial (*Mass Tort Litigation Reporter* 1998). Asbestos trials have occasionally combined hundreds and even thousands of individual claims (*Acands, Inc. v. Abate*, 710 A.2d 944 [Md. Ct. Spec. App. 1998]). These procedures permit courts to achieve substantial efficiencies with the formalities of class action certification. Efficiencies can also be obtained by case management orders that set firm schedules for trials and pretrial proceedings (*In re Cigarette Cases*, *cited in* 11.1 TPLR 2.3).

Another procedure available in some jurisdictions is "offensive collateral estoppel," which exempts future plaintiffs from retrying issues on which specific defendants have lost in prior trials (*Blonder-Tongue Laboratories v. University of Illinois Foundation*, 402 U.S. 313, 91 S. Ct. 1434 [1971]). This device has not yet been used in tobacco litigation.

Claims of Nonsmokers

ETS Claims Against Manufacturers

Although most litigation involving adverse health effects from exposure to ETS has not directly involved tobacco companies, a line of cases has developed during the 1990s naming tobacco companies as defendants and targeting the companies' behavior in attempting to, as a British-American Tobacco Company Ltd. document from 1988 put it, "keep the controversy alive"—referring to the industry's common strategy of shifting the focus from personal health to personal freedom (Boyse 1988; Chapman 1997).

Claims of nonsmokers asserting damages from ETS have been filed on behalf of both individual and class plaintiffs. As nonsmokers, alleged victims of ETS are not vulnerable to the defense that they knowingly subjected themselves to the dangers of tobacco use. *Butler v. American Tobacco Co.* ([Miss., Jones Cty. May 12, 1994], *cited in* 9.3 TPLR 3.335 [1994] [Amended Complaint]), filed May 13, 1994, seeks damages from six tobacco companies and others for the lung cancer death of Burl Butler, a nonsmoker and "paragon of clean living" (Greising and Zinn 1994, p. 43), who allegedly contracted the disease after inhaling customers' tobacco smoke for 35 years while working at his barber shop (Kraft 1994). Butler became the first case in which documents allegedly stolen from Brown & Williamson Tobacco Corporation by one of its former employees were admitted into evidence, despite objections by the defendants that attorney-client privilege prohibited disclosure. Lawyers for Butler's estate contend that "the documents will show, among other things, that tobacco companies manipulated and suppressed scientific research for years to mislead their customers about smoking's dangers" (Ward 1996). State Circuit Court Judge Billy Joe Landrum postponed

commencement of the trial on motion by the plaintiffs to allow new defendants to be added to the action. The amended complaint now contends that manufacturers of talcum powder used by Butler in his barber shop "knew or should have known that Environmental Tobacco Smoke can act synergistically with . . . Talc, to cause respiratory diseases, including lung cancer, and other health problems" (*Butler v. Philip Morris Inc.*, Civil Action No.:94-5-53 [Miss., Jones Cty. Mar. 4, 1996], *cited in* 11.3 TPLR 3.307, 3.315 [1996] [Second Amended Complaint and Request for Trial by Jury]). A new trial date has not yet been set.

Another case involved a woman who had never smoked but who was subjected to prolonged and repeated exposure to ETS since childhood and died of lung cancer in 1996 at the age of 44 (*Buckingham v. R.J. Reynolds Tobacco Co.*, 713 A.2d 381 [N.H. 1998]). Two years before her death, Roxanne Ramsey-Buckingham sued the major tobacco companies and a local store in strict liability and under Restatement (Second) of Torts, section 389. She alleged "that the defendants knew or should have known that it was unlikely that their products would be made reasonably safe prior to their customary and intended use, and that it was foreseeable that Ms. Ramsey-Buckingham would be endangered by ETS from the defendants' cigarettes" (p. 383). A superior court judge dismissed her lawsuit in 1995 on the basis that New Hampshire does not recognize a strict liability cause of action under section 389. However, the New Hampshire Supreme Court reinstated the lawsuit in May 1998, ruling that "section 389 is not a form of strict liability because it requires the defendant's knowledge of the product's dangerous condition and does not require that the product be defective. . . . The comments to section 389 make it clear that a bystander, assuming he is within the scope of foreseeability of risk, is owed a duty under law and may recover on a showing of breach, damage, and causation" (p. 385). The case was sent back to the trial court for further proceedings.

One case that was tried before a jury in March 1998 resulted in a verdict for the defendants. In that case, *RJR Nabisco Holdings, Corps. v. Dunn* (657 N.E.2d 1220 [Ind. 1995]) a nonsmoking nurse who worked for 17 years at a Veterans Administration Hospital died of lung cancer at the age of 56. Her widower sued a group of tobacco companies, claiming that her exposure to ETS from her patients at the hospital had killed her. A six-person jury returned a verdict for the defendants. Interviewed after the trial, some of the jurors explained that they had had doubts as to whether the cancer that killed Mrs. Wiley had originated in the lungs or, as the tobacco companies' lawyers had argued, in the pancreas and had then spread to the lungs (Dieter 1998).

The most prominent ETS case with tobacco company defendants has been *Broin v. Philip Morris Cos.*, which was brought against the six major cigarette manufacturers in 1991. Seven current and former nonsmoking flight attendants, who contracted lung cancer or other ailments and who face an increased risk of disease as a result of exposure to ETS on airplanes, filed a class action suit on behalf of thousands of flight attendants harmed by exposure to ETS on flights that predated the federal ban on smoking on domestic airline flights. In 1992, a Dade County circuit judge dismissed the class action aspect of the complaint, but two years later, a three-judge panel of the District Court of Appeal of Florida, Third District, unanimously reversed the order of dismissal and ordered that the class action allegations be reinstated (*Broin, cited in* 9.1 TPLR 2.1).

In late December 1996, the Circuit Court for Dade County authorized the mass notification of some 150,000 to 200,000 flight attendants so they could either sign up as plaintiffs or exclude themselves from the case to pursue their own suits if they wished. In June 1997, jury selection in the trial began. More than three months later, midway through the companies' presentation of their defense, the parties announced a proposed settlement whereby the defendants would pay $300 million to establish the Broin Research Foundation. The settlement would permit flight attendants harmed by ETS exposure aboard airlines to sue the tobacco companies, regardless of statute of limitations issues. In the event of such individual actions, the defendants would assume the burden of proof on the issue of whether ETS exposure is capable of causing disease in nonsmokers. Dade County Circuit Judge Robert P. Kaye approved the proposed settlement on February 3, 1998, calling it "fair, reasonable, adequate and in the best interests of the class," but challengers to the settlement have appealed (*Broin v. Philip Morris Cos.*, No. 91-49738 CA [22] [Fla., Dade Cty. Feb. 3, 1998] *cited in* 13.1 TPLR 2.79 [1998]). As of August 1998, the appeal was pending.

One workplace setting that has generated substantial exposure to ETS has been casinos. In 1997 nine casino dealers filed a class action lawsuit against 17 tobacco companies and organizations. The lawsuit seeks tens of millions of dollars in damages and class certification of up to 45,000 casino dealers working in Nevada, along with their estates and family members. The plaintiffs in this case, *Badillo v. American Tobacco Co.* (No. CV-N-97-00573-DWH [D. Nev. 1997]), are also seeking to get medical monitoring for the dealers who have had years of exposure to ETS on the job. In Apri

1998, a federal judge denied all of the motions to dismiss by the defendants, except for The American Tobacco Company, which has merged with Brown & Williamson Tobacco Corporation.

In April 1998, a group of nonsmoking casino workers filed a lawsuit in New Jersey Superior Court against several tobacco companies and the industry's trade association, the Tobacco Institute, because the workers were being made sick by their exposure to ETS at work (Smothers 1998).

Suing Tobacco Companies Over Failure to Disclose Harm From ETS

In a unique case from California, the City Attorney of Los Angeles filed suit in July 1998, against 16 tobacco companies (those that sell cigarettes, cigars, or pipe tobacco) and 15 retailers on the grounds that they are violating Proposition 65, an initiative statute passed by the voters of California in 1986. That law, known as the Safe Drinking Water and Toxic Enforcement Act of 1986 and contained in California Health and Safety Code section 25249.6, provides that "no person in the course of doing business shall knowingly and intentionally expose any individual to a chemical known to the state to cause cancer or reproductive toxicity without first giving clear and reasonable warning to such individual."

The lawsuit specifically lists 46 chemicals referred to as carcinogenic constituents of tobacco smoke and 8 (arsenic, cadmium, carbon disulfide, carbon monoxide, lead, nicotine, toluene, and urethane) as reproductive toxicants. The city attorney's complaint cites a number of prominent government studies: *The Health Consequences of Involuntary Smoking*, the 1986 report of the U.S. Surgeon General on smoking and health; *Environmental Tobacco Smoke: Measuring Exposures and Assessing Health Effects*, published in 1986 by the National Research Council; *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders*, a report issued by the U.S. Environmental Protection Agency in January 1993; and *Health Effects of Exposure to Environmental Tobacco Smoke*, published by the California Environmental Protection Agency in September 1997. The complaint alleges that "Notwithstanding this overwhelming body of governmental information, and notwithstanding their own knowledge of these facts since at least 1981, the Tobacco Defendants have each knowingly and intentionally concealed from, and thereby deceived, every nonsmoking individual exposed to environmental tobacco smoke by the sale and use of tobacco products in California. By these acts of knowing and intentional concealment and deception, the Tobacco Defendants, and their agents, the Retailer Defendants, have each individually violated Proposition 65" (*California v. Philip Morris Inc.*, No. BC194217 [Calif., Los Angeles Cty. July 14, 1998], *cited in* 13.4 TPLR 3.195 [1998]).

The City of Los Angeles' lawsuit will likely benefit from a court decision rendered in 1997 in a federal court located some 3,000 miles away. A nonsmoker in Florida filed a lawsuit against various tobacco companies, alleging that she suffers from severe emphysema and an array of other injuries as a result of prolonged exposure to ETS from the normal and foreseeable use of the companies' products. The companies filed a motion to dismiss her case, contending that the Federal Cigarette Labeling and Advertising Act preempts claims based on state law duties to disseminate information relating to smoking and health. A judge in the U.S. District Court for the Southern District of Florida denied the motion to dismiss, concluding that the federal act's preemption of state regulations "based on smoking and health" does not preempt regulations involving ETS. "The Court finds it unlikely that Congress intended the word 'smoking' to mean inhaling second-hand smoke," since the "Congressional reports make clear the purpose of the [federal act] is not to inform non-smokers of the hazards of breathing second-hand smoke but rather to inform smokers and potential smokers of the dangers of actively smoking" (*Wolpin v. Philip Morris, Inc.*, No. 96-1781-CIV-KING, 1997 WL 535218 [S.D. Fla. Aug. 18, 1997]). The court also ruled that the federal act did not by implication preempt a claim based on harm from ETS (Sweda 1998).

ETS Cases Against Nontobacco Parties

Injunctive relief from ETS. In 1976, Donna Shimp (see "Legal Foundation for Regulation of Public Smoking," earlier in this chapter), an office worker in New Jersey, sought intervention from the courts to provide her relief from exposure to ETS at her worksite (*Shimp*, 368 A.2d 408). The court ruled that the evidence was "clear and overwhelming. Cigarette smoke contaminates and pollutes the air, creating a health hazard not merely to the smoker but to all those around her who must rely upon the same air supply. The right of an individual to risk his or her own health does not include the right to jeopardize the health of those who must remain around him or her in order to properly perform the duties of their jobs" (p. 415). In granting an injunction to ensure that Shimp be provided a smoke-free workplace, the New Jersey Superior Court provided a clear example of taking seriously the health concerns of nonsmokers who are forced to breathe ETS.

The *Shimp* decision preceded most of the medical studies that have demonstrated the adverse health effects of ETS. In the 22 years since *Shimp*, lawsuits designed to protect nonsmokers from the health hazards caused by involuntary exposure to ETS have escalated.

A 1982 decision from the Missouri Court of Appeals gave additional momentum to nonsmoking workers seeking legal relief from on-the-job exposure to ETS. In *Smith* (643 S.W.2d 10), the Missouri Court of Appeals reversed a trial court's dismissal of a lawsuit brought by a nonsmoking worker who was seeking an injunction—a form of direct intervention by a court—to prevent his employer from exposing him to tobacco smoke in the workplace. The court of appeals ruled that if Paul Smith were to prove his allegations at trial, then "by failing to exercise its control and assume its responsibility to eliminate the hazardous condition caused by tobacco smoke, defendant [Western Electric Co.] has breached and is breaching its duty to provide a reasonably safe workplace" (p. 13). Although the nonsmoking worker eventually lost his case after it was sent back to the trial court, the court of appeals decision remains as a precedent that will help similar cases survive motions to dismiss (Sweda 1998).

The following year, a nonsmoking social worker in Attleboro, Massachusetts, was granted a temporary restraining order (which by law could last no more than 10 days) against smoking in the open office area where she worked with about 39 coworkers, 15 of whom smoked. In *Lee* (*cited in* 1.2 TPLR 2.82), a superior court judge denied a motion by the employer to dismiss the case, ruling that "an employer has no duty to make the work place safe if, and only if, the risks at issue are inherent in the work to be done. Otherwise, the employer is required to 'take steps to prevent injury that are reasonable and appropriate under the circumstances'.... Accordingly, this court cannot say that plaintiff's claim fails to make out a legally cognizable basis for relief" (p. 2.83). The case was settled in January 1985 when the employer, the Commonwealth of Massachusetts, agreed to provide the plaintiff, Marie Lee, and the other nonsmoking workers there, with a separate nonsmoking area with ventilation separate from the ventilation in the smoking area. As it turned out, only 4 of the office's 40 workers chose to work in the smoking area (Sweda 1998).

Handicap Discrimination/Americans With Disabilities Act

A new theory for ensuring ETS protection for nonsmokers involved using the ADA. As the rationale for applying the ADA to the workplace, Parmet and colleagues (1996) explained: "The ADA was enacted in 1990 to provide a 'clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities' [42 U.S.C. section 12101(b)(1)]. The act prohibits discrimination against individuals with disabilities on the job [42 U.S.C. section 12112(a)] and in places of 'public accommodation' [42 U.S.C. section 12182(a)], as well as by state and local governments [42 U.S.C. section 12132]" (p. 909).

Initially, some plaintiffs did not succeed in acquiring relief from ETS under the ADA. For example, in *Harmer v. Virginia Electric and Power Co.* (831 F. Supp. 1300 [E.D. Va. 1993]), an employee suffering from bronchial asthma sued his employer, contending that in failing to ban smoking at the workplace, the company had violated the ADA by discriminating against him because of his disability. Harmer contended that after he requested a smoke-free work environment, the company retaliated against him by reducing his job authority and failing to promote him. Though recognizing Harmer's disability, the district court dismissed the claim, saying that he "still must show that he is entitled to a complete smoking ban as a reasonable accommodation to his disability, and he is unable to do so" (p. 1306). This was so "because the many smoking limitations that the employer had put in place, coupled with improvements such as the installation of air filtration devices, were sufficient to enable the plaintiff to work. Of course, a patient more severely disabled might have required further accommodations" (Parmet et al. 1996, p. 912).

In *Emery v. Caravan of Dreams, Inc.* (879 F. Supp. 640 [N.D. Tex. 1995]), two women hypersensitive to ETS filed suit under the ADA, contending that they were effectively precluded from attending musical performances at the defendant's establishment because smoking was permitted there. After a one-day, jury-waived trial, a federal judge ruled against the plaintiffs, but noted that they should have brought their claim under the ADA's reasonable accommodation provision, instead of the section of the act that bars the establishment of rules that "screen out" disabled people (p. 643).

A different result had occurred in a case from Connecticut. In *Staron v. McDonald's Corp.* (51 F.3d 353 [2d Cir. 1995]), plaintiffs brought an action under the ADA 42 U.S.C. section 12101, saying that the presence of tobacco smoke in the defendants' restaurants was preventing the plaintiffs from having the opportunity to benefit from the defendants' goods and services. The plaintiffs, all of whom have adverse reactions to ETS, also alleged that the defendants' restaurants are places of public accommodation under 42 U.S.C. section 12181

After a district judge granted the defendants' motion to dismiss the case, the United States Court of Appeals for the Second Circuit reversed, ruling that "we find that plaintiffs' complaints do on their face state a cognizable claim against the defendants under the Americans with Disabilities Act" (p. 355). The court noted that "the determination of whether a particular modification is 'reasonable' involves a fact-specific, case-by-case inquiry that considers, among other factors, the effectiveness of the modification in light of the nature of the disability in question and the cost to the organization that would implement it [p. 356]. . . . We see no reason why, under the appropriate circumstances, a ban on smoking could not be a reasonable modification" (p. 357).

An Illinois woman suffering from chronic severe allergic rhinitis and sinusitis sought a smoke-free work environment and sued her former employer after it "repeatedly refused to provide" the plaintiff with a reasonable accommodation to her disability. After filing an ADA claim with the Equal Employment Opportunity Commission and a worker's compensation claim, she was terminated. A federal judge in *Homeyer v. Stanley Tulchin Associates, Inc.* (No. 95 C 4439, 1995 WL 683614 [N.D. Ill. Nov. 17, 1995]) granted the defendants' motion to dismiss, saying that the plaintiff "does not, and cannot, allege that her sensitivity to [ETS] substantially limits her ability to find employment as a typist generally. Thus, Homeyer is not a qualified individual with a disability, and, accordingly, is not entitled to the protection of the ADA" (p. 3).

However, the United States Circuit Court of Appeals for the Seventh Circuit unanimously reversed the district court's ruling and sent the case back for trial. Noting that the district court had ignored Homeyer's claim that she was disabled in that her breathing, an essential life activity, was affected by ETS, the court of appeals ruled that "we cannot say at this stage that it would be impossible for her to show that her chronic severe allergic rhinitis and sinusitis either alone or in combination with ETS substantially limits her ability to breathe" (*Homeyer v. Stanley Tulchin Associates, Inc.*, 91 F.3d 959, 962 [7th Cir. 1996]).

In October 1997, a New York jury awarded $420,300 to an asthmatic prison guard, Keith Muller (*Muller v. Costello*, No. 94-CV-842 (FJS) (GJD), 1996 WL 191977 [N.D.N.Y. May 20, 1996]), who had been fired after he had made numerous complaints about the effect of ETS exposure on his health. While serving as a correctional officer, Muller had become seriously ill—including numerous occasions when he had to be taken to a hospital directly from the prison where he worked—after being exposed to ETS. After Muller's treating physician had recommended that he work in a smoke-free environment, the New York State Department of Correctional Services instead provided him with a mask that, according to Muller, made him even more ill. Furthermore, wearing the mask had subjected Muller to widespread ridicule, putting him in even greater personal danger from the breakdown in the respect that the inmates had for him. Whereas a judge in 1996 had barred the plaintiff's negligence and civil rights claims in *Muller v. Costello*, the court allowed Muller's ADA claim to proceed.

Ruling on posttrial motions, the judge reduced the award to $300,000 because of the cap on compensatory damages contained in 42 U.S.C. section 1981a(b)(3). The court also rejected the defendant's motion to vacate or reduce the verdict as excessive, ruling that the "plaintiff submitted evidence of discrimination that had taken place over a period of years during which time he was forced to endure mental suffering, embarrassment, economic hardship, actual termination and physical injury. In view of this evidence, the Court finds that the jury award of $300,000 is not excessive and does not shock the conscience as a matter of law" (*Muller v. Costello*, 997 F. Supp. 299, 303 [N.D.N.Y. 1998]).

In a more recent case, three asthmatic women sued Red Lobster and Ruby Tuesday restaurants under the ADA. The plaintiffs in *Edwards v. GMRI, Inc.* (No. 119893 [Md., Montgomery Cty. Nov. 26, 1997], *cited in* 13.1 TPLR 3.1 [1998]) said that they attempted to patronize the defendants' restaurants but were forced to leave because of the ETS there. In their complaint, the plaintiffs stated that the defendants' "failure to establish a policy prohibiting smoking in their restaurants throughout the state discriminates against the Plaintiffs on the basis of their disability in their use and enjoyment of" the restaurants (p. 3.3).

Seepage of Smoke From One Dwelling Unit to Another

The 1990s have seen the development of cases in which a nonsmoker living in an apartment or condominium unit is being adversely affected by smoke entering his or her dwelling space from elsewhere. In June 1998, a Boston Housing Court judge ruled in favor of nonsmoking tenants who were being evicted for nonpayment of rent (*50-58 Gainsborough Street Realty Trust v. Reece and Kristy Haile*, No. 98-02279, Boston Housing Court [1998]). After pleading with the landlord for several months to do something about the problem of smoke from a first-floor nightclub constantly entering their second-floor apartment and disrupting their ability to use and enjoy their

apartment, the tenants got no relief. After they withheld their monthly rent payments of $1,450, the landlord brought an action in housing court seeking their eviction. The court ruled that "the evidence does demonstrate to the Court that the tenants' right to quiet enjoyment [of their apartment] was interfered with because of the second hand smoke that was emanating from the nightclub below" (p. 34). The court ruled that "as the tenants describe the second hand smoke within their apartment at nighttime, the apartment would be unfit for smokers and non-smokers alike" (p. 7). That interference with the quiet enjoyment of the tenants' apartment was a defense to the effort to evict them. Also, the court found for the tenants in the amount of $4,350—the same amount that the tenants had withheld over the course of three months.

In *Dworkin v. Paley* (93 Ohio App. 3d 383, 638 N.E.2d 636 [Ohio Ct. App. 1994]), Dworkin, a nonsmoker, entered into a one-year lease with Paley to reside in a two-family dwelling; the lease was later renewed for an additional one-year term. During the second year, Paley, a smoker, moved into the dwelling unit below Dworkin's. Two weeks later, Dworkin wrote to Paley to tell her that her smoking was annoying him and causing him physical discomfort, noting that the smoke came through the common heating and cooling systems shared by the two units. Within a month, Dworkin vacated the premises. Eight months later, he brought a legal action to terminate the lease and recover his security deposit from Paley. The lawsuit, which alleged that Paley had breached the covenant of quiet enjoyment and statutory duties imposed on landlords (including doing "whatever is reasonably necessary to put and keep the premises in a fit and habitable condition," p. 387) was dismissed on a motion for summary judgment. However, the Cuyahoga County Court of Appeals reversed the dismissal, concluding that a review of the affidavits in the case "reveals the existence of general issues of material fact concerning the amount of smoke or noxious odors being transmitted into appellant's rental unit" (p. 387). The case was thus sent back to the trial court.

In June 1998, a prominent New York law firm, Weil, Gotshal & Manges LLP, sued the owner and landlord of the office building where it is located, as well as the tenant located one floor below, because of ETS seepage into its office space. The firm alleges in its lawsuit, that as a result of the smoke infiltrating into its 29th floor offices, "some of WG&M's partners, associates and employees have suffered illness, discomfort, irritation and endangerment to their health and safety, and/or have been unable to use or occupy their offices or workstations on the WG&M 29th Floor Premises" (*Weil, Gotshal & Manges LLP v. Longstreet Associates, L.P.* [N.Y., N.Y. Cty. June 12, 1998], *cited in* 13.4 TPLR 3.188 [1998]).

Many landlords are not waiting to be sued. The Building Owners and Managers Association International, a trade association for 16,000 office landlords and owners, has been advising its members to lessen their risk of ETS liability by banning smoking whenever possible. During the past two years, the proportion of member office buildings that banned smoking increased from 68 to 80 percent (White 1998).

United States Supreme Court Ruling on ETS in Prisons—Eighth Amendment Issues

Perhaps the most frequent area of litigation involving exposure to ETS has come in a setting where the exposure is both involuntary and inescapable—prisons. A landmark case that eventually reached the United States Supreme Court started in Nevada when a nonsmoking prisoner was housed in the same cell as a heavy smoker (*McKinney v. Anderson*, 924 F.2d 1500 [9th Cir. 1991]). The nonsmoker brought a civil rights lawsuit against the prison officials, claiming that his Eighth Amendment right to be protected from cruel and unusual punishment was being violated due to his constant exposure to ETS. Although his case was thrown out initially by a district court in Nevada, the lawsuit was reinstated by the United States Court of Appeals for the Ninth Circuit. The court ruled that even if the inmate could not show that he suffered from serious, immediate medical symptoms caused by exposure to ETS, compelled exposure to that smoke is nonetheless cruel and unusual punishment if at such levels and in such circumstances as to pose an unreasonable risk of harm to the inmate's health.

On June 18, 1993, the Supreme Court ruled in a 7- to 2 decision that McKinney's case could go forward. The Court affirmed "the holding of the Court of Appeals that McKinney states a cause of action under the Eighth Amendment by alleging that petitioners [the prison officials] have, with deliberate indifference, exposed him to levels of ETS that pose an unreasonable risk of serious damage to his future health" (*Helling v. McKinney*, 113 S. Ct. 2475 [1993]).

ETS and Child Custody Cases

Disagreements between parents who are divorcing can, of course, cover a wide variety of subjects. One of the issues that has increasingly become a significant subject of disputes that have ended up before a judge in probate court has been the exposure to ETS on the part of a child or children caught up in a

custody battle. Over the past 11 years, there have been recorded cases in at least 20 states (Sweda 1998). One of the earliest was *Wilk v. Wilk* (*In re Wilk v. Wilk*, 781 S.W.2d 217 [Mo. App. 1989]). The trial court in this case granted primary custody of the children to the mother, who had been advised by a doctor that the children, one of whom was asthmatic, should not be taken to the father's home because he smoked. The Missouri Court of Appeals ruled that the trial court did not err in awarding custody of the minor children to the mother.

In a case from Kansas, an ex-wife with custody sought permission to move with her children to another state; the ex-husband responded with a motion to obtain custody. The district court did make the change by awarding custody to the ex-husband after finding that the ex-wife's smoking had harmed the children. The ex-wife appealed, arguing that there had been no evidence to prove that her smoking had caused her children's health problems. The court of appeals affirmed the district court's change of custody, noting that there was evidence that her smoking had harmed the children: "That finding is supported by the testimony of three doctors that second-hand smoke aggravated the children's health problems and placed them at risk for further health problems" (*In re Aubuchon*, 913 P.2d 221 [Kan. Ct. App. Mar. 22, 1996]).

In some cases, the smoking issue is not sufficient to produce a change of custody. For example, in *Helm v. Helm* (01-A-01-9209-CH00365, 1993 WL 21983 [Tenn. App. Feb. 3, 1993]), the trial court awarded custody of a five-year-old child to the father. The mother appealed the divorce decree, arguing before the Court of Appeals of Tennessee that the father smoked around the child. The court said that "Other than exposure to violent movies and cigarette smoke, no evidence is cited that the father has neglected or mistreated the child" (p. 2). The trial court's judgment was affirmed, with the mother being accorded visitation rights. In *Baggett v. Sutherland* (No. CA 88-224, 1989 WL 5399 [Ark. App. Jan. 25, 1989]), a nonsmoking father attempted to obtain a change in custody on the basis of, among other things, the fact that the mother smoked in the presence of children who were allergic to smoke. Although the lower court had found that circumstances were not so changed as to warrant a change in custody, it did acknowledge that smoking was detrimental to the children. The mother was forbidden to smoke in the home or allow anyone else to smoke in the home; the judge "made it clear that he would exercise continuing jurisdiction over the parties to insure compliance with that order" (p. 3).

Rulings in other cases have been the product of compromise. In *Northcutt v. Northcutt*, a 1997 case, a nonsmoking father objected to ETS around his 2-year-old son, who has asthma and has had repeated respiratory infections, bronchitis, allergies, and earaches (Sweda 1998). As part of a joint custody agreement, a Warren County, Tennessee, judge ordered the mother to keep her son away from ETS. Each parent was to have custody for six months per year.

Victims of Smoking-Related Fires

Smoking is the leading cause of deaths and injuries by residential fire. According to the Building and Fire Research Laboratory of the National Institute of Standards and Technology, cigarettes start more fatal fires than any other ignition source, causing about 30 percent of all fire deaths in this country. For example, in 1989, 44,000 cigarette-ignited fires caused 1,220 deaths, 3,358 injuries, and $481 million in property damage (Karter 1993).

In 1984, Congress passed the Cigarette Safety Act (Public Law 98-567), creating a Technical Study Group to assess the feasibility of developing a less incendiary cigarette. The group concluded that changing a standard cigarette's diameter, paper porosity, and tobacco density would produce a cigarette that would not transfer enough heat to cause a fire when dropped on most upholstery (Technical Study Group on Cigarette and Little Cigar Fire Safety 1987). The tobacco industry maintains that even if such cigarettes could be manufactured, when smoked they would not burn as thoroughly as current brands, meaning that fire-safe cigarettes would deliver more tar, nicotine, and carbon monoxide to the smoker (Levin 1987).

The prospect of technologies for making less incendiary cigarettes raises the question of whether the manufacturers might be held liable for failure to incorporate such a feature. Until now, product liability litigation for fires caused by cigarettes has met with no more success than smokers' claims for injuries to health. The first such case to produce a judicial decision, *Lamke v. Futorian Corp.* (709 P.2d 684 [Okla. 1985]), involved a fire started when a cigarette ignited a sofa, resulting in severe burns to much of the plaintiff's body. The Oklahoma Supreme Court applied the so-called consumer expectation test to find that the cigarettes in question were not dangerous to an extent beyond what would be expected by the ordinary consumer. The consumer expectation test, which evolved from comments to section 402A of the Restatement (Second) of Torts, today survives as the law in a minority of jurisdictions (American Law Institute 1995).

The prevailing view, endorsed by the current draft of the Restatement (Third) of Torts, would determine liability for defective product design by a risk-benefit standard that evaluates the quality of the manufacturer's design decision by reviewing whether the manufacturer properly weighed the comparative costs, safety, and mechanical feasibility of one or more alternative designs (Green 1995). In *Lamke*, the court found that evidence regarding the feasibility of manufacturing a less incendiary cigarette was irrelevant to considerations of consumer expectation, but such evidence might be found persuasive in a jurisdiction following a risk-benefit standard for determining design defects. Whether the tobacco companies suppressed research and product development regarding fire-safe cigarettes is under investigation by the antitrust division of the U.S. Department of Justice (Shapiro 1994c).

Fire claims by smokers would face many of the familiar obstacles to recovery but, as two pending claims illustrate, many of the potential plaintiffs in fire litigation are not smokers but third parties untainted by the decision to smoke. In *Kearney v. Philip Morris Cos.* ([D. Mass. May 11, 1992], *cited in* 7.2 TPLR 3.65 [1992]), suit was brought on behalf of a woman who died in a fire started by her husband's cigarette. The plaintiff's attorneys focused "on the issue of additives and other manufacturing techniques that cigarette makers use to ensure that cigarettes will stay lit even if they aren't being smoked" (Wilke and Lambert 1992). On February 16, 1996, Judge Robert E. Keeton granted summary judgment[a] in favor of Philip Morris, holding that even under the more forgiving standard of liability for design defect, "fatal gaps" existed in evidence submitted by the plaintiff in supporting her claim that adoption of an alternative design by the company would have prevented the fire started by Mr. Kearney's cigarette (*Kearney v. Philip Morris Inc.*, 916 F. Supp. 61, 66 [D. Mass. 1996]).

Another cigarette-caused fire claim seeks recovery based on the fire-related injuries received by a 21-month-old infant trapped in her child car seat (*Shipman v. Philip Morris Cos.*, Cause No. 26294 [Tex., Johnson Cty. Oct. 7, 1994], *cited in* 10.1 TPLR 3.91 [1995]).

Enhancing Prohibitory Regulation by Private Litigation

Enforcing Minors' Access Laws

Although selling cigarettes to minors is prohibited in all states and the District of Columbia, retail store employees frequently ignore the law (Lew 1992). Enforcing these widespread and important statutes is typically left to government officials who have competing commitments and limited sanctioning powers. A pioneering suit, brought by tobacco activists against a Massachusetts convenience store chain, sought to supplement this ineffectual arrangement by private enforcement. The initiative first took the form of a test case, sponsored by the Tobacco Products Liability Project, charging that Philip Morris was engaged in a "civil conspiracy" with the convenience store chain to sell cigarettes to minors. A divided Massachusetts Supreme Court found the conspiracy unproven (*Kyte v. Philip Morris Inc.*, 408 Mass. 162, 556 N.E.2d 1025 [Mass. 1990]). The plaintiffs then refocused the suit directly against the convenience store chain, alleging that it had violated the Massachusetts Consumer Protection Act, which allows consumers to bring civil suits directly against vendors for money damages and injunctions. The suit terminated in a settlement in which the chain agreed to demand proof of age from would-be cigarette purchasers. In 1992, the Tobacco Products Liability Project launched a project to research the legal basis for such suits in all 50 states and to provide informational and strategic support for such litigation (Lew 1992).

After the settlement in *Kyte*, the attorney general in Massachusetts, acting under the state's consumer protection laws (Mass. Ann. Laws ch. 93a, sec. 1) began to conduct tests using minors posing as customers to gauge retailer compliance with state bans on tobacco sales to persons under 18 years of age (Mass. Ann. Laws ch. 270, sec. 6). Settlements were reached with several supermarket chains in 1994 for monetary damages as well as implementation of measures designed to reduce the risk of further illegal tobacco sales to minors (Tobacco Products Liability Project 1996). By 1998, state attorneys general offices in 26 states began working with the National Association of Attorneys General and the Tobacco Control Resource Center (1998) to develop approaches to prevent illegal tobacco sales to minors.

Kyte presents an instance of a lawyer functioning as a private attorney general to secure the enforcement of underenforced public standards. This case suggests that restrictions on sales to minors might be enforced more effectively by establishing informational networks and incentives (such as the recovery of attorneys' fees) to facilitate widespread and routine

[a] A summary judgment is a judgment granted without a formal trial when it appears to the court that there is no genuine issue of fact and that the moving party is entitled to judgment as a matter of law.

exertions by lawyers. Such private enforcement is a well-established feature of a number of regulatory regimes, including consumer credit regulations, securities laws governing insider trading, and bounties paid for apprehending persons who defraud the government. In devising such strategies, the risks of underuse, overuse, and abuse must be identified to frame a scheme of incentives that yields optimum results.

One state's highest court has upheld the legal validity of using the civil provisions of consumer protection statutes to enforce penal laws prohibiting tobacco sales to minors. The California Supreme Court held that a private and for-profit enterprise had standing under that state's consumer protection laws to maintain a private action in the public interest, even though the underlying penal statute contained no provisions for a private right of action (*Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 557, 71 Cal. Rptr. 2d 731 [1998]).

Restrictions on Advertising

State and local laws restricting the advertising and promotion of tobacco products (see "Advertising and Promotion," earlier in this chapter) provide another occasion for private initiatives. The California Supreme Court held that federal preemption did not extend to bar a suit claiming that the "Joe Camel" advertising campaign targeted minors and thus violated California's ban on unfair business practices (see "A Critical Example: Joe Camel," earlier in this chapter) (*Mangini*, 875 P.2d 75). This suit, like *Kyte*, invites consideration of the benefits and costs of the private attorney general device. Such an evaluation must compare the performance of private efforts with actual rather than idealized governmental regulatory activity. For example, the FTC did secure a consent decree against the Pinkerton Tobacco Company (*In re Pinkerton Tobacco Co.*, 115 F.T.C. 60, 1992 F.T.C. LEXIS 35 [Jan. 9, 1992]) to cease promotion of its smokeless products at a televised tractor pull. On the other hand, after FTC staff lawyers recommended in 1994 that the FTC charge R.J. Reynolds Tobacco Company with using the Joe Camel campaign to promote cigarettes to children, the commissioners voted 3 to 2 to take no action (*FTC:Watch* 1994).

The presence of private attorneys general may add to the limited resources of public regulators. The U.S. Department of Justice recently settled a lawsuit against Madison Square Garden for circumventing the 1971 federal ban on broadcast advertising of cigarettes by placing cigarette advertising where it would be displayed in television broadcasts. The case ended with a consent decree in which the arena admitted no wrongdoing but agreed to remove cigarette advertising from sites where it would be seen on television (Thomas and Schwartz 1995). The government's enforcement capacity in this area could be amplified if there were sufficient incentives for private litigants.

The International Dimension of Tobacco Litigation

Tobacco Litigation Abroad

The first and second waves of tobacco litigation were uniquely U.S. phenomena, but the third wave has an international dimension that its predecessors lacked. Only a few years after a 1990 survey reported that "there has been no history of tobacco litigation in the [European Community]" (Cooper 1990, p. 291), counterparts of many of the third-wave litigation initiatives have appeared in other countries. In Australia, employees injured by ETS have recovered substantial damages from their employers (Daynard 1994a). A public interest group, the Consumer's Federation of Australia, secured a judicial declaration that the Tobacco Institute of Australia Ltd. had falsely claimed that "there is little evidence and nothing which proves scientifically that cigarette smoke causes disease in non-smokers" (Daynard 1994a, p. 60). A French public interest group, acting as private attorneys general, successfully enforced bans against tobacco advertisements on radio and television (*Gourlain v. Societe Nationale D'Exploitation Industrielle des Tabacs et Allumettes [SEITA]* [Tribunal de Grande Instance de Montargis Dec. 19, 1996], *cited in* 11.8 TPLR 3.1073 [1996]). In Canada, a class action suit based on addiction was filed against Canada's three largest tobacco manufacturers. To show that the tobacco companies knew of nicotine's addictiveness, the suit relied on documents uncovered in the United States (Van Rijn 1995). In England, the Legal Aid Board granted certificates of eligibility for legal aid to fund 200 cases brought by smokers alleging that tobacco manufacturers had failed to meet their legal duty to minimize the risks of smoking (PR Newswire 1995). Legal Aid's willingness to finance the litigation comes after a three-year battle for funding, led by the British group Action on Smoking and Health (Milbank 1995).

Foreign Plaintiffs in the American Courts

Overseas sales are an increasingly important sector of the American tobacco industry: exports grew from 8 percent of total production in 1984 to 35 percent in 1996 (MacKenzie et al. 1994; U.S. Department of Agriculture 1996). The absence of warnings on the

packaging of exports and the aggressive promotional activity might help foreign plaintiffs who brought claims in U.S. courts overcome some of the barriers that have protected tobacco companies from domestic plaintiffs. However, such litigation would face other formidable obstacles, including the problem of establishing a substantive right to recover according to foreign law and an expanded notion of the responsibilities of multinational corporations for merchandise sold overseas. Such an expansion seems unlikely in the light of the reluctance of U.S. courts to provide a forum for foreign victims of corporate misconduct. This reluctance was dramatized in the litigation arising from the 1984 chemical plant explosion in Bhopal, India (Jasanoff 1985; Cassels 1993; Galanter 1994). Although the U.S. courts decided that the case should be tried in India rather than in the United States (*In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in December, 1984*, 634 F. Supp. 842 [S.D.N.Y. 1986], *aff'd in part* 809 F.2d 195 [2d Cir. 1987], *cert. denied*, 484 U.S. 871, 108 S. Ct. 199 [1987]), the U.S. parent company was required, as a condition of moving the case to India, to submit to the jurisdiction of the Indian courts. A number of rulings in the Bhopal litigation also created the basis for enhanced liability of U.S. multinational corporations for their overseas operations. In a later proceeding, a U.S. court acknowledged that a foreign government might establish itself as the exclusive representative of victims of a mass tort (*Bano Bi v. Union Carbide Chems. & Plastics Co.*, 984 F.2d 582 [2d Cir. 1993]). If any of the current third-wave claims flourish, foreign claims will likely be presented to U.S. lawyers and filed in U.S. courts.

On May 12, 1998, the Republic of Guatemala became the first nation to file a lawsuit against the U.S. tobacco industry for the recovery of public health care expenses (Davis 1998) (*Guatemala v. Tobacco Institute* [D.C. May 12, 1998], *cited in* 13.3 TPLR 3.121 [1998]).

Counterthrust: Tobacco Industry Initiation of Litigation and Other Tactics

The Tobacco Industry Response to the Science of ETS

In its 1993 lawsuit filed in U.S. District Court in Greensboro, North Carolina, the tobacco industry accused the EPA of using improper procedures, including statistical manipulation, to arrive at a predetermined conclusion and sought "a declaration that EPA's classification of ETS as a Group A [known human] carcinogen and the underlying risk assessment are arbitrary, capricious, violative of the procedures required by law, and unconstitutional" (*Flue-Cured Tobacco Cooperative Stabilization Corp. v. United States Environmental Protection Agency* [M.D.N.C. June 22, 1993], *cited in* 8.2 TPLR 3.97 [1993]). As discussed earlier in this chapter (see "Health Consequences of Exposure to ETS"), on July 17, 1998, U.S. District Judge William L. Osteen Sr. issued a ruling whereby the court annulled Chapters 1–6 and the Appendices to EPA's *Respiratory Health Effects of Passive Smoking: Lung Cancer and Other Disorders* (EPA 1992; Meier 1998b). The judge reached his conclusion only after having denied the EPA's motion to dismiss the case even though the EPA had never taken, and indeed had no authority to take, final agency action (e.g., the adoption of a regulation restricting smoking) based on its report (*Flue-Cured Tobacco Cooperative Stabilization Corp. v. United States Environmental Protection Agency*, 857 F. Supp. 1137 [M.D.N.C. 1994]).

This lawsuit, filed in 1993, was not the first instance of the tobacco industry attacking scientists and their work on ETS. Internal industry memos were cited in an article in April 1998 in the *Wall Street Journal*: "Determined to keep reports about second-hand smoke from mushrooming, the tobacco industry mobilized a counter attack in the mid-1980s to systematically discredit any researcher claiming perils from passive smoke" (Hwang 1998). In a February 25, 1985, letter, Anthony Colucci, who was a top scientist at R.J. Reynolds Tobacco Company, wrote to H.E. Osmon, a director of public affairs at R.J. Reynolds: ". . . we anticipate that if [then-EPA scientist James] Repace runs true to form there will be a good deal of media copy written about their [Repace's and naval researcher Alfred Lowrey's] analyses and thus we should begin eroding confidence in this work as soon as possible" (Hwang 1998).

A British-American Tobacco Company memo from 1988 details a meeting at which Philip Morris unveiled its plans to organize the "selection, in all possible countries, of a group of scientists either to critically review the scientific literature on ETS to maintain controversy, or to carry out research on ETS. In each country a group of scientists would be carefully selected, and organized by a national coordinating scientist" (Boyse 1988, p. 2). The Philip Morris plan begins by drawing up a list of "European scientists who have had no previous association with tobacco companies" (p. 2). The scientists are then contacted and

> asked if they are interested in problems of Indoor Air Quality: tobacco is not mentioned at this stage. CVs are obtained and obvious "anti-smokers" or those with "unsuitable backgrounds" are filtered out. The remaining scientists are sent a literature pack containing approximately 10 hours of